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CASE NO. ___

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,

Petitioner,

v.

DAVID WYANT,

Respondent.

STATE OF OHIO,

Petitioner,

v.

JAMES MAY, JR., et. al.,

Respondent.

STATE OF OHIO,

Petitioner,

v.

CLANCY VAN GUNDY, et. al.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT
NOS. 91-199, 91-1519, 91-1211/1589**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER OHIO REVISED CODE SECTION 2927.12, WHICH PROVIDES FOR A PENALTY ENHANCEMENT IF CERTAIN CRIMINAL CONDUCT IS COMMITTED "BY REASON OF THE RACE, COLOR, RELIGION OR NATIONAL ORIGIN OF ANOTHER PERSON OR GROUP OF PERSONS", VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

PARTIES

The parties are the State of Ohio as the petitioner in all three matters; David Wyant as the respondent in Case No. 91-199, Ohio Supreme Court; James May, Jr., Mark Staton, and Aaron Plessinger, as respondents in Case No. 91-1519, Ohio Supreme Court; and Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp and Terry Breedlove, Jr., as respondents in Case No. 91-1211/91-1589, Ohio Supreme Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI 5

APPENDIX:

Slip Opinion, *State v. Wyant*, Nos. 91-199, 91-1519, 91-1211/1589, Ohio Supreme Court, August 26, 1992 ..... A-1

State v. Wyant, No. 90CA-2, CA Delaware County, December 6, 1990 ..... A-22

State v. Wyant, No. 89CR-92, Common Pleas, Delaware County, December 21, 1989 ..... A-29

State v. Van Gundy, et. al., Nos. 90AP473, 474, 475, 477, 478, 479, 480, CA Franklin County, April 18, 1991 (Opinion, April 16, 1991) A-30

State v. Van Gundy, et. al., Nos. 89-CR-11-5166, A-G Common Pleas, Franklin County, March 28, 1990 ..... A-45

State v. May, et. al., Nos. 12239, 12289, 12260, CA Montgomery County, June 27, 1991 ..... A-50

State v. May, No. 89-CR-4687, Common Pleas, Montgomery County, May 15, 1990 ..... A-59

State v. Staton, No. 90-CR-660, Common Pleas, Montgomery County, May 15, 1990 ..... A-64

State v. Plessinger, No. 90-CR-660, Common Pleas, Montgomery County, May 15, 1990 ..... A-65

Ohio Revised Code §2901.22 ..... A-66

Ohio Revised Code §4112.02(H) A-67

18 U.S.C. §242 ..... A-70

18 U.S.C. §243 ..... A-70

18 U.S.C. §245(b) (2) A-70

42 U.S.C. §2000 C-6(a) (2) A-74

TABLE OF AUTHORITIES

Page

Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) 10, 11, 12

Dawson v. Delaware, 503 U.S. ____, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) 10, 11, 12, 18

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 18, 19

Milkovich, v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) 19

Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1985) 19

Oregon v. Beebe, 67 Or.App. 738, 680 P.2d 11 (1984) 6

People v. Grupe, 141 Misc.2d 6, 532 N.Y.S.2d 815 (1988) 15

People v. Justice, No. 90-25264 FH, Circuit Court, Washtenaw County, Michigan, June 5, 1991 15

R.A.V. v. City of St. Paul, 505 U.S. ____, 112 S.Ct. 2538, 120 L.Ed.2d 305 ..... 7-10, 12-13, 15, 18

Screws v. United States, 325 U.S. 71, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1945) 12

State, ex. rel. Rear Door Bookstore v. Tenth District Court of Appeals (1992), 63 Ohio St.3d 354, 588 N.E.2d 116 19

State v. Hendrix, 107 Or.App. 734, 813 P.2d 1115 (1991) 15

TABLE OF AUTHORITIES CONT'D.

Page

State v. LaDue, No. 4088-8-90 Cm.Cr., Vermont Dist. Ct., Unit 2, April 18, 1991 15

State v. Mitchell, 169 Wis.2d 153, 485 N.W.2d 807 (1992) 14, 15

State v. Plowman, No. S38328, ____, Or. ____, ____ P.2d ____, 1992 Ore. LEXIS 158, August 27, 1992 15

State v. Stalder, 599 So.2d 1280 (1992) 15

United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986) 13

United States v. Sayler, 893 F.2d 113 (6th Cir. 1989) ... 6

United States v. White, 788 F.2d 390 (6th Cir. 1986) 12

Williams v. United States, 341 U.S. 97, 71 S. Ct. 576, 95 L.Ed. 774 (1950) 12

STATUTES

Ohio Revised Code Section 2901.22 17

Ohio Revised Code Section 2927.12 6

Ohio Revised Code Section 4112.02(H) 13

18 U.S.C. §242 12

18 U.S.C. §243 12

18 U.S.C. §245 (b) (2) 12, 13

42 U.S.C. §2000 C-6 (a) (2) 13

TABLE OF AUTHORITIES CONT'D

Page

CONSTITUTIONAL PROVISIONS

United States Constitution,
Amendment 1 ..... 5, 7-9, 12-13, 16, 18-19

Ohio Constitution, Article I, Section 11 ..... 18, 19

MISCELLANEOUS

Anti Defamation League, *Hate Crimes Statutes; A Response to Anti-Semitism, Vandalism, and Violent Bigotry, 1990* 14

ADL Law Report, *Hate Crimes Statutes, A 1991 Status Report* 15

Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275 16

H.R. 4797, Hate Crimes Sentencing Enhancement Act of 1992 11

Section H, Federal Sentencing Guidelines 11

OPINIONS BELOW

The opinion of the Ohio Supreme Court in Case No. 91-199, 91-1519, and 91-1211/1589 is reported as *State v. Wyant* (1992), 64 Ohio St.3d 566, ____, N.E.2d ____. The slip opinion of the Ohio Supreme Court is set forth in the appendix to the petition (A-1).

The opinion of the Court of Appeals of Delaware County in *State v. Wyant*, No. 90 CA-2, December 6, 1990 is unreported. (A-22). The entry of the Court of Common Pleas of Delaware County in *State v. Wyant*, No. 89 CR-92, December 21, 1989 is unreported. (A-29).

The opinion of the Court of Appeals of Montgomery County in *State v. James B. May Jr., et. al.*, Nos. 12239, 12259, and 12260, June 27, 1991 is unreported. (A-50). The decisions of the Court of Common Pleas of Montgomery County in *State v. May, Jr.*, No. 89 CR-4687, *State v. Staton* and *State v. Plessinger*, both Nos. 90 CR-660, all decided May 15, 1990, are unreported. (A-59, 64, 65).

The opinion of the Court of Appeals of Franklin County in *State v. Van Gundy, et. al.*, Nos. 90 AP473, 474, 475, 477, 478, 479, 480, April 16, 1991 is unreported. (A-30). The decision of the Common Pleas Court of Franklin County in *State v. Van Gundy, et. al.*, Nos. 89 CR-11-5166, A-G, March 28, 1990 is unreported. (A-45).

JURISDICTION

The decision of the Ohio Supreme Court in *State v. Wyant, supra*, was issued August 26, 1992. No petition for rehearing was sought and the petition for writ of certiorari is timely filed. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ohio Constitution, Article I, Section 11.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motive and for justifiable ends, the party shall be acquitted.

Ohio Revised Code §2927.12, Pages 1987

(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

STATEMENT OF THE CASE

WYANT

David Wyant was charged and convicted of ethnic intimidation in violation of Ohio Revised Code §2927.12. Under the Ohio statute, when certain predicate offenses (aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, and telephone harassment) are committed "by reason of the race, color, religion or national origin of another person or group of persons" the penalty for such conduct is enhanced one penalty level higher than the penalty for the underlying predicate offense[1]. Wyant was found guilty in a jury trial and sentenced to one and one-half years imprisonment.

The underlying predicate conduct in Wyant's case was aggravated menacing. On May 29, 1989, Wyant and the complaining witnesses, Jerry White and Patricia McGowan had adjoining campsites in a state park. White and McGowan were black; Wyant and all the people in his party were white. Sometime between 10:30 and 11:45 p.m., Mr. White went to park officials to complain of loud music from the Wyant campsite. A park official went to the site and Wyant turned off the radio.

Fifteen or twenty minutes later, the radio came on again and White and McGowan heard racial epithets and threats made toward them. Wyant said: "We didn't have this problem until those niggers moved in next to us." "I ought to shoot that black mother fucker" and "I ought to kick his

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[1] A Wisconsin statute, Wis. Stat. 939.645 (1989-90) is the subject of a separate petition filed contemporaneously by the State of Wisconsin under the title, *State v. Todd Mitchell*. The Wisconsin and Ohio statutes are similar in providing for penalty enhancement for what are generally labelled "hate crimes". There are several differences in the statutes. One notable difference is that Wisconsin's statute provides enhanced penalties only when a victim is selected because of the victim's race, religion, etc. Under the Ohio statute, enhanced penalties are also provided for criminal conduct committed against a victim because of that victim's association with someone of a different race, religion, etc.

black ass." White and McGowan complained to park officials and left the park.

Prior to trial, Wyant moved to dismiss the charge of ethnic intimidation on the basis the statute was unconstitutional. The trial court denied the motion to dismiss and upon appeal the Court of Appeals of Delaware County, by 2-1 vote, affirmed. The Supreme Court of Ohio reversed, holding Revised Code §2927.12 to be unconstitutional.

MAY, STATON, PLESSINGER

James May, Jr., was charged with ethnic intimidation predicated on aggravated menacing. The trial court dismissed the charge on the basis that Revised Code §2927.12 was unconstitutional. Since the indictment was dismissed, there are no facts of record. The indictment alleged that May, a landlord, and several other white men threatened Gregory Crawford, a black tenant, and several of his friends, also black, with a gun, a tire iron, and racial slurs.

Mark Staton and Aaron Plessinger were charged with ethnic intimidation. The charges against them were dismissed by the trial court based on the ruling in May's case. The indictment alleged that Staton and Plessinger, who are white, threatened Jessie and Dianne Bowlin, who also are white, because they had black visitors in their home. Allegedly racial slurs and threats were made against the Bowlins and their visitors, a window was broken in the Bowlin house, and a car belonging to the visitors was damaged.

On appeal, the Court of Appeals of Montgomery County and the Ohio Supreme Court affirmed the dismissal of the ethnic intimidation charge.

VAN GUNDY, et. al.

Clancy Van Gundy and six others identified in the list of parties were charged with ethnic intimidation, predicated on aggravated menacing. In addition, Clancy Van Gundy was charged with felonious assault. Prior to trial, the trial court dismissed the ethnic intimidation charges against all seven

defendants, holding R.C. §2927.12 was unconstitutional. The trial of the felonious assault charge continued and Clancy Van Gundy was convicted of that charge. See, *State v. Van Gundy* (1992), 64 Ohio St.3d 230, 594 N.E.2d 604. The indictment alleged that Clancy Van Gundy hit a black juvenile, Jason Harris, with a baseball bat following a chase during which he and his associates chanted racial threats.

Upon appeal, the Court of Appeals of Franklin County and the Ohio Supreme Court affirmed on the basis R.C. §2927.12 was unconstitutional.

OHIO SUPREME COURT

The constitutional challenges in the lower court proceedings were not uniform. Taken as a whole, however, R.C. §2927.12 was challenged as violating "freedom of speech" and vagueness, equal protection, due process, and overbreadth. The Ohio Supreme Court did not rule on any grounds other than "freedom of speech" holding that R.C. §2927.12 violated the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution. As discussed in the argument in support of certiorari, the latter holding is not an independent state ground, since Article I, Section 11 of the Ohio Constitution is coextensive with the First Amendment.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The Court should grant certiorari to determine whether, consistent with the First Amendment to the United States Constitution, a penalty may be enhanced when criminal conduct is engaged in "by reason of the race, color, religion, or national origin of another person or group of persons". This is an issue which has not previously been addressed by this Court. The issue has national significance for similar state and federal criminal laws. The issue also impacts the validity of civil laws prohibiting discrimination. These civil and criminal laws use similar language to that found constitutionally offensive by the Ohio Supreme Court. The Court should hold that a penalty may be enhanced if criminal

conduct was committed "by reason of race, color, religion or national origin", since the harm to victims and society is greater in such situations than when the criminal conduct is engaged in for other reasons.

R.A.V.

Ohio Revised Code §2927.12 is not a novel statute. Like other penalty enhancement statutes, the Ohio legislature has increased the sentencing range for one form of criminal conduct because that criminal conduct is perceived to be more harmful to victims than other variations of the same conduct. Victim impact is a proper justification for enhanced punishment. *United States v. Sayler,* 893 F.2d 113 (6th Cir. 1989). There are numerous laws enhancing the penalty for criminal conduct against the young or the elderly, even though the underlying criminal conduct is the same as committed against others not in those age categories.

Ohio Revised Code §2927.12 is another example of a victim impact enhancement statute. The Ohio legislature recognized that there is special harm when criminal acts are committed against the victims of "hate crimes". Like crimes against the young or elderly, the victim of a hate crime may have been chosen just because of who the person is. Even if the victim is not singled out on such grounds, the impact of a hate crime is demonstrably greater. The Court in *Oregon v. Beebe,* 67 Or. App. 738, 740, 680 P.2d 11, 13 (1984), stated this proposition best:

> The legislature may legitimately determine that the danger to society from assaultive conduct directed toward an individual because of his race, religion, or national origin is greater than the danger from such conduct under other circumstances. Assaultive behavior motivated by bigotry is directed not just at the victim, but in a sense, toward the group to which the particular victim belongs. Such confrontations therefore, readily — and commonly do — escalate from individual conflicts to mass disturbances. That is a far more serious potential

> consequence than that associated with the usual run of assault cases.

In rejecting the familiar premise that two forms of criminal conduct may be punished differently if sufficient justification exists for the increased penalty, the Ohio Supreme Court misunderstood the thrust of this Court's recent decision in *R.A.V. v. City of St. Paul*, 505 U.S. ____ , 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The Court below believed penalty enhancement for criminal conduct committed "by reason of race," etc. was the viewpoint discrimination this Court found prohibited in *R.A.V.*. Ohio's statute, however, is far different from the cross burning ordinance in *R.A.V.*. Under the Ohio Supreme Court's reading of *R.A.V.*, seemingly all "hate crimes" statutes must fail under the First Amendment. The Court can reject that conclusion.

R.A.V. involved a "hate speech" statute aimed at speech and thought itself, rather than a "hate crime" statute aimed at a particular type of conduct. In *R.A.V.*, the Court stated:

> St. Paul has not singled out an especially offensive mode of expression — it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to the merely obnoxious) manner. *Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.*

Supra, 505 U.S. at ____ , 112 S.Ct. at 2549, 120 L.Ed.2d at 324. (Emphasis added.) The fault of the St. Paul ordinance was that it focused on the message that was communicated rather than the conduct through which the message was expressed.

Ohio's statute focuses instead on the conduct involved. In order to be subject to penalty enhancement under that statute, a criminal act must first occur. Only where an otherwise punishable criminal act has occurred do the penalty enhancements provided by Ohio Law come into play.

Even if considered to be expression, Ohio seeks to punish and deter only "an especially offensive mode of expression" — conduct, the commission of which is a crime.

This Court made clear in *R.A.V.* that its decision was not intended to undercut the network of federal and state laws prohibiting discriminatory conduct. This Court stated:

> . . . since words can in some circumstances violate laws directed not against speech, but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexual derogatory "fighting words" among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, . . . Where the government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

Supra, 505 U.S. at ____ , 112 S.Ct. at 2546-7, 120 L.Ed.2d at 321-22. (Citations omitted.) Ohio's law at issue here punishes discriminatory conduct, but does not target "expressive content". A person may think or say anything they want, no matter how deplorable, and may do so without fear of punishment. Only when that thought motivates otherwise criminal conduct may that person be charged under Ohio law. Then any thought behind the act is "swept up incidentally" within the conduct involved. The conduct of the person, thus, is not "shielded from regulation" by the fact the actor had a discriminatory idea or philosophy behind commission of the act.

The Ohio Supreme Court agreed that the conduct involved was proscribable consistent with the First Amendment. However, the lower court held this was true only under the

general criminal statute. According to the Chio court, the First Amendment prohibits raising the penalty for conduct which itself can be punished consistent with the First Amendment unless the penalty for all other forms of the same conduct is raised as well. Anything less would be "content based viewpoint discrimination". *R.A.V.* dealt with whether the message of "cross burning" could be prohibited consistent with the First Amendment in the first instance. As the Court stated in *R.A.V.*, the ordinance:

> . . . is not a prohibition of fighting words that are directed at certain persons or groups (which would be "*facially*" valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias motivated' hatred . . . .

505 U.S. at ____ , 112 S.Ct. at 2548, 120 L.Ed.2d at 323. The flaw of the Court below was attempting to apply the reasoning of that decision to a wholly different statute which differentiates two forms of conduct, each of which may admittedly be proscribed consistent with the First Amendment.

A fundamental difference from *R.A.V.* is that here conduct, not speech, is involved. However, even in the context of a "speech" statute, this Court in *R.A.V.* stated:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from the First Amendment protection, is also neutral enough to form the basis of distinction within the class.

Supra, 505 U.S. at ____ , 112 S.Ct. at 2545-6, 120 L.Ed.2d at 320-21. The entire class of threats is excluded from the First Amendment for the most neutral of reasons — a crime

has been committed. Such a reason is neutral enough to allow distinctions within the general category of threats based on the harm involved. Ohio's challenged law is an extension of this principle.

The Ohio Supreme Court approached Ohio's penalty enhancement statute simplisticly; it concluded that because the law was designed to address the problem of "hate crimes", it must constitute the same type of viewpoint discrimination this Court found impermissible in *R.A.V.*. Ohio's law provides enhanced penalties for the predicate offense, not because one viewpoint is believed to be better than another, however, but because crimes committed "by reason of race," etc., are deemed more dangerous to the victim and to society as a whole. This Court should use this case as a vehicle to further explain *R.A.V.*.

DAWSON

This Court can also use this case to square the holding of the Court below with this Court's decision in *Dawson v. Delaware*, 503 U.S. at ____ , 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). In *Dawson*, this Court reaffirmed the principle that a court may consider and use an offender's motivation in committing a crime as a basis for increasing the sentencing for that crime.

Dawson is a follow-up to this Court's earlier decision in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). In *Barclay*, the Court considered the trial court's explanation for its imposition of a death sentence. The trial court specifically discussed the racial motive for the murder and compared the murder victims to the victims of Nazi concentration camps. In rejecting a constitutional challenge to the imposition of the death penalty on the grounds that it was improper for the Court to consider the defendant's motives, this Court stated:

> We reject this argument. The United States Constitution does not prohibit a trial judge from

> taking into account the elements of racial hatred in this murder.

Supra, at 463 U.S. at 949, 103 S.Ct. at 3424, 77 L.Ed.2d at 1143. It would be anomalous to suggest that a judge may take racial hatred into account in his other sentencing decisions but that a legislature may not do the same when setting the penalty guidelines for that judge to follow. Ohio asserts that there is no constitutional distinction between the considerations deemed permissible in *Dawson* and those mandated by Ohio law.

In *Dawson*, this Court found that the trial court's reliance on the fact that the defendant was a member of a white power prison group was improper because that membership did not motivate the crimes committed. As such, this Court concluded that evidence of racial hatred *which was not material to the crime* should not be considered in sentencing. It expressly found, however, that where the motive is causally connectable to the crime at issue, that motive may be considered in a trial court's sentencing determinations. Where a person commits a criminal act against another "*by reason of* race, color," etc., the motive is, by definition causally linked to the crime at issue.

In *Dawson* and in *Barclay*, this Court sought to assure that the evidence considered in setting a sentence is reasonably and rationally related to that sentencing decision. Ohio's penalty enhancement law requires proof of that very relationship before an increased penalty can be imposed[2]. In fact, Ohio provides more protection against arbitrary

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[2] Another example of such a relationship is Section H, Federal Sentencing Guidelines which adds two levels to a penalty for a basic predicate offense to "reflect the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights". The enhanced penalties of Section H are associated with the federal criminal statutes involving racial, religious, or ethnic crimes, discussed under the next subheading of this petition. For the Court's information, Congress is currently considering H.R. 4797: the "Hate Crimes Sentencing Enhancement Act of 1992".

consideration in sentencing than what is required by the decisions in *Dawson* and *Barclay*. There the consideration of evidence is determined under the lesser standard of proof for sentencing. Ohio's statute requires proof beyond a reasonable doubt as part of the criminal conviction itself. The Court should accept certiorari to reconcile the Supreme Court of Ohio's decision with *Dawson*.

IMPACT ON FEDERAL CRIMINAL STATUTES

The Ohio Supreme Court failed to square its holding in this case with federal criminal statutes like 18 U.S.C §242. That statute and others utilize the very same statutory language deemed impermissible by the Ohio Supreme Court. This, despite the fact that this Court in *R.A.V.* cited to 18 U.S.C. §242 as an example of the type of statute that is proper under the First Amendment. *R.A.V.*, 112 S.Ct. at 2546, 120 L.Ed.2d at 322.

18 U.S.C. §242 prohibits willfully subjecting an "inhabitant . . . to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens . . .". Other statutes prohibit disqualification of a juror "on account of race, color, or previous condition of servitude", 18 U.S.C. §243, or willfully injuring, intimidating, or interfering with "any person because of his race, color, religion, or national origin" in participating in various federally protected activities, 18 U.S.C. §245(b)(2). Ohio's law provides for enhanced penalties for certain crimes when committed "by reason of race, color, religion, or national origin". If, as claimed, the First Amendment prohibits making distinctions in conduct based on discriminatory motive, then surely these federal statutes would be unconstitutional as well. As this Court well knows, however, statutes like these or their predecessors have existed and been utilized since reconstruction in society's battle against "hate crimes". *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); *Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1950). As an example, in *United States v. White*, 788 F.2d 390 (6th Cir. 1986), 18 U.S.C. §242 was

used to punish the firebombing of a black person's house. In *United States v. Ebens*, 800 R.2d 1422 (6th Cir. 1986), 18 U.S.C. 245 was violated by the beating death of an oriental.

In short, there is substantial historical precedent for punishing conduct that occurs on "account of race, color," etc. *R.A.V.* was not intended as a broad based retroactive challenge to these laws which have long been considered constitutional. The Court should accept certiorari if for no other reason than to ratify the continuing validity of these federal criminal statutes.

IMPACT ON CIVIL DISCRIMINATION LAWS

Just as the decision below potentially impacts federal criminal laws, it also impacts state and federal civil laws prohibiting discrimination. There are literally thousands of laws using the precise words which the Ohio Supreme Court now finds violate the First Amendment. As an illustration only, 42 U.S.C. §2000 C-6(a)(2) prohibits discrimination in admission to public colleges "by reason of race, color, religion, sex, or national origin". Ohio Revised Code §4112.02(H) generally prohibits discrimination in housing "because of race, color, religion, sex, ancestry, handicap, or national origin", and Section (H)(12) thereof prohibits any person from intimidating another because of the exercise of any right protected or granted by that section. Laws like these are directly aimed at and designed to prevent and provide redress against discrimination. If one followed the Ohio Supreme Court's reasoning, the validity of these laws would be called into question and society's efforts to prohibit discrimination would be seriously curtailed.

Apparently recognizing this concern, the Ohio Supreme Court attempted to distinguish the law it struck down in this case from other laws attempting to redress the same harm. The distinction, according to the Court, is, that general anti-discrimination laws target the *act* of discrimination, not the bigoted motive. *Wyant*, slip op. at 10 (A-13). But, as the Ohio Supreme Court itself recognized, "[d]iscriminatory motive is necessary to [a disparate treatment] theory of employment

discrimination". *Id.* An act of discrimination is simply the carrying out of certain behavior because of a discriminatory motive. Any "distinction" between the two is necessarily an artificial one — one presumes the existence of the other.

The Ohio Supreme Court also claimed that discrimination laws prohibit differences in treatment and the consequences thereof, rather than discriminatory motive. *Id.* Ohio's penalty enhancement law does the same. A victim of a "hate crime" is treated differently (e.g., is harassed in a particular way) because the offender intends to cause a specific harm to that person because of racial or religious animus. And, as discussed previously, there is a quantum difference in harm to society as a result of a racially or religiously motivated criminal act.

The distinction the Ohio Supreme Court seeks to draw is an illusory one. Under many existing laws, conduct which is not punishable becomes punishable solely because of the discriminatory motive behind it. Ohio's ethnic intimidation act merely enhances the penalty for what is already punishable conduct. If "by reason of race," etc., is viewpoint discrimination in Ohio's penalty enhancement law, it surely must also be viewpoint discrimination to make unlawful, by discriminatory motive, that which otherwise would be lawful. In *State v. Mitchell*, 169 Wisc.2d 153, 485 N.W.2d 807 (1992), Judge Bablitch, in dissent, criticized a similar distinction as "the majority's constitutional pen gets too close to the trees and fails to see the forest". *Id.* (J. Bablitch, dissent, 485 N.W.2d at 820.) The Court should grant certiorari to preserve the forest of discrimination laws.

IMPACT ON THE LAW OF OTHER STATES/ CONFLICT IN STATE COURT DECISIONS

Ohio's statute was based on a model draft by the Anti-Defamation League. There are over 20 states which have "hate crime" statutes based on the ADL model legislation. In addition, 46 states have some form of "hate crime statute". (Statutes compiled in *Anti-Defamation League, Hate Crime Statutes: A Response To Anti-Semitism, Vandalism, and*

Violent Bigotry, 1990; and ADL Law Report, Hate Crimes Statutes: A 1991 Status Report.) The decision of the Ohio Supreme Court acts as precedent for a challenge to all of these existing laws. The Court should review Ohio's statute to guide assessments of the validity of similar statutes.

In addition, the Court should grant certiorari to resolve a direct conflict in state court decisions. The highest courts to have ruled on the validity of similar statutes in Oregon, New York, Michigan, and Vermont have all upheld their state statutes. *State v. Hendrix*, 107 Or.App. 734; 813 P.2d 1115 (1991); *People v. Grupe*, 141 Misc.2d 6; 532 N.Y.S.2d 815 (1988); *People v. Justice*, No. 90- 25264 FH, Circuit Court, Washtenaw County, Michigan, June 5, 1991; *State v. LaDue*, No. 4088-8-90 Cm. Cr. Vermont Dist. Ct., Unit 2, April 18, 1991. On the other hand, the Wisconsin Supreme Court held their statute unconstitutional in *State v. Mitchell, supra.* [reversing 163 Wis.2d 652; 473 N.W.2d 1.] A petition for certiorari has been filed by Wisconsin in *Mitchell.* In addition, various and conflicting lower court decisions in Florida are on appeal to the Florida Supreme Court. *State v. Stalder*, 599 So.2d, 1280 (Fla. 1991). (Court accepted jurisdiction to "pass[ed] upon a question of great public importance requiring immediate resolution by this Court.")

Most recently, the Oregon Supreme Court issued its opinion in *State v. Plowman*, No. S38328, ____ Or. ____, ____ P.2d ____ (1992), 1992 Ore. LEXIS 158 (August 27, 1992), upholding Oregon's "hate crimes" law. The Court specifically notes the Wisconsin opinion in *Mitchell, supra*, but concludes; "we disagree with that reasoning". *Plowman, supra*, slip opinion at page 15, 1992 Ore. LEXIS 158 at 22. *Plowman* also recognizes this Court's decision in *R.A.V.*, but concludes, as Ohio argues, that *R.A.V.* involved a statute "directed against the substance of speech" as opposed to "laws that are directed against conduct". *Plowman, supra*, slip opinion at page 14, 1992 Ore. LEXIS 158 at 20. The Court should resolve the dispute among state courts on this issue of truly national importance.

SOCIAL IMPACT

It is hard to imagine another decision that could have as much social impact as the decision of the Court below. The Ohio Supreme Court itself recognized the problem and dilemma of "hate crimes" and deplored that such a situation exists in our society. Congress has also recognized the special problem of hate crimes by passing the "Hate Crimes Statistics Act of 1990", Pub. L. No. 101-275. Not a day goes by that citizens are not shocked by a newspaper's reporting another incident involving one person's intolerance toward another. Yet the Court below holds that the First Amendment prohibits recognizing and treating this special problem by more severely punishing the predicate offense.

The Court below takes the view that Ohio has punished the underlying conduct through the normal criminal penalties and therefore cannot increase the penalty for a racial or religious crime. Presumably if the legislature wishes to raise the penalty for racial and religious crimes, it can raise the penalty for the underlying predicate offense. However, that legislative response would not make any sense since it would increase the penalty for some individual conduct for which the legislature deems existing deterrence to be adequate to regulate other conduct for which the legislature deems existing deterrence to be inadequate. In addition, such a legislative response would not recognize the special stigmatization of the victim of a racial or religious crime or express society's condemnation of such criminal behavior. While *R.A.V.* prohibits viewpoint discrimination against various types of expression, it does not require society to turn a blind eye to conduct directed at victims "by reason of race", or the harm thereby caused. The Court should address whether additional protections may be extended by a legislature to these victims.

OHIO'S STATUTE IS CONSTITUTIONAL

The Ohio Supreme Court believed a "thought crime" statute had been enacted. The lower court believed that penalty enhancement was directly penalizing an offender's

discriminatory motive. It is not; penalty enhancement punishes conduct and it does so in a manner which reflects additional harm to the victim and society as a whole. The statute addresses itself to conduct committed "by reason of race," etc., to advise potential offenders of what conduct will be deemed more harmful to society and, thus, subject to penalty enhancement. The purpose of the penalty enhancement itself is not to punish "discriminatory thoughts".

Even if the statute is viewed as punishing "discriminatory motive", it is constitutional.

First, it is possible to violate the Ohio law at issue here without having any motive other than to discriminate against a person or persons in a protected class. For example, if a person committed telephone harassment (one of the underlying predicate offenses) to drive a minority out of a neighborhood, it would not matter whether his motivation was because he hated minorities or he felt their presence hurt his property values. What prompts a violator to discriminate is irrelevant. As under the discrimination statutes, the conduct being prohibited is the discrimination itself, regardless of the ideas or philosophy prompting it.

Second, to the extent discriminatory motive is involved, it actually makes it more difficult for the State to obtain a conviction than it would be to obtain a conviction for the underlying predicate offense. The highest degree of mental intent required under the predicate offenses is "knowingly". R.C. §2901.22 defines purpose as a person's "specific intention to cause a certain result". Knowingly requires a lesser showing of mental intent than purpose because a person can act knowingly "regardless of his purpose". If a person acts with a specific discriminatory motivation, he actually acts purposefully to "cause a specific result". While motive and intent are not always the same, a discriminatory motive and the purpose to cause specific harm are co-extensive.

Third, under Ohio law, motive is not normally an element of a crime. That does not mean, however, that motive may

never constitutionally be made an element of the crime. If, as *Dawson* holds, the First Amendment does not prohibit consideration of "racial motivation" in the sentencing phase, it should not prohibit a legislature from merging the sentencing considerations into the definition of a crime.

Ohio has no doubt that an enhancement based solely on the "message" conveyed would be impermissible. There would not even be an equal protection rational basis for distinguishing the punishment for two types of proscribable conduct if the sole purpose was to suppress the message. In the words of *Dawson*, the message would not be material to the crime; in the words of *R.A.V.*, the distinction would not be "swept up incidentally within the reach of a statute directed at conduct, rather than speech". Ohio's ethnic intimidation statute fails neither *Dawson* nor *R.A.V.*.

INDEPENDENT STATE GROUNDS

It is anticipated that respondents will argue certiorari should not be granted since the Court found R.C. §2927.12 to also violate Article I, Section 11 of the Ohio Constitution. However, it is clear that the Ohio Court's opinion was not based on an independent state ground.

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this Court set forth the standard for judging an independent state ground. Basically, the Court held that a state court must make clear in its opinion that a decision was being reached on the state constitutional ground independent of any belief that such result was dictated by the Court's decision on federal constitutional grounds. There is no indication that has occurred here.

In *Michigan*, the Court stated that it is not enough to merely mention or cite to the State constitutional prohibition. Instead, the Court stated:

> . . . when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when

> the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1041, 103 S.Ct. at 3476, 77 L.Ed.2d at 1208. There is no independent analysis of the State constitution in the opinion of the court below. Once the Court below found that a thought crime statute existed under the First Amendment, its holding that the statute also violated Article I, Section 11 was foreordained. As a result, the state constitutional holding is clearly based on and interwoven with federal law. In *State, ex. rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992), 63 Ohio St.3d 354, 588 N.E.2d 116, the Ohio Supreme Court adopted a lower court holding that Ohio's constitutional guarantee of free speech is identical to that contained in the First Amendment.

> Appellants have cited no Ohio case, nor has our research discovered any authority, for the proposition that the free speech guarantees accorded by the Ohio Constitution are broader than those provided under the United States Constitution.

63 Ohio St.3d at 362. There is no reason to believe the lower court departed from that view in this case.

The Ohio Supreme Court is well aware of the rule in *Michigan v. Long, supra.* In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), this Court held that the Ohio Supreme Court's decision below did not rest on independent state grounds even though the Ohio Supreme Court invoked the free speech guarantees of Article I, Section 11 of the Ohio Constitution as well as the First Amendment. See also, *Ohio v. Johnson,* 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) to the same effect with respect to a different constitutional provision. Based on the treatment of its opinions in *Milkovich and Johnson,* if the

Ohio Supreme Court meant its decision to be based on independent state constitutional grounds thereby foreclosing review by this Court, it was well aware that an unambiguous statement of intention to do so was required.

For all the above reasons, the Court should grant certiorari and reverse.

STATE v. WYANT
Statement of the Case

THE STATE OF OHIO, APPELLEE, v. WYANT, APPELLANT.

THE STATE OF OHIO, APPELLANT, v. MAY, APPELLEE.

THE STATE OF OHIO, APPELLANT, v. STATON ET AL., APPELLEES.

THE STATE OF OHIO, APPELLANT, v. VAN GUNDY ET AL., APPELLEES.

[Cite as State v. Wyant (1992), --- Ohio St.3d ---]

Criminal law — Ethnic intimidation — R.C. 2927.12 unconstitutional.

The effect of R.C. 2927.12 is to create a "thought crime," in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

(Nos. 91-199, 91-1519 and 91-1211/91-1589 Submitted April 15, 1992-Decided August 26, 1992.)

APPEAL from the Court of Appeals for Delaware County, No. 90-CA-2.

CERTIFIED by the Court of Appeals for Montgomery County, Nos. 12239, 12259 and 12260.

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, Nos. 90AP-473, 90AP-474, 90AP-475, 90AP-477 90AP-478, 90AP-479 and 90AP-480.

Wyant Case: case No. 91-199

On May 29, 1989 appellant David Wyant and his wife rented campsite L-16 at Alum Creek State Park. On May 31, the

Wyants' relatives came to join them, and rented L-17, the adjoining campsite. On June 2, Wyant rerented his site, but released the relatives' site, as they were to leave that day. Later in the day plans changed, and Wyant attempted to rerent site L-17. He was told that the site had been rented to someone else, and so he rented L- 18.

Site L-17 had been rented to the complaining witnesses, Jerry White, and his girlfriend, Patricia McGowan. White and McGowan are black; everyone in the Wyant party is white. There was little contact between the groups for most of the evening of June 2nd, but sometime between 10:30 and 11:45 p.m., White went to park officials to complain of loud music coming from the Wyant campsite. A part official went to site L-16 and asked Wyant to turn off the radio. Wyant complied.

Fifteen or twenty minutes later the radio came on again, and White and McGowan heard racial epithets and threats made in a loud voice by Wyant. Specifically, Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black mother fucker," and "I ought to kick his black ass." White and McGowan complained to park officials and left the park.

Wyant was indicted and convicted on one count of ethnic intimidation, R.C. 2927.12, predicated on aggravated menacing, and sentenced to one and one-half years' imprisonment. The court of appeals affirmed the conviction. The cause is before the court pursuant to the allowance of a motion for leave to appeal.

May Case: case No. 91-1519

Defendant James May, Jr. was charged with ethnic intimidation predicated on aggravated menacing. He moved to dismiss. The trial court dismissed on the grounds that R.C. 2927.12 is unconstitutional. The *May* case was consolidated with the *Plessinger/Staton* case on appeal.

Plessinger/Staton Case: case No. 91-1519

Defendants Aaron Plessinger and Mark Staton were charged with ethnic intimidation predicated on aggravated menacing. They moved to dismiss on the grounds that R.C. 2927.12 is unconstitutional, and on the authority of the court's decision in the *May* case. The trial court dismissed. Upon motion by the State, the Court of Appeals consolidated the *May* case with the *Plessinger/Staton* case. The court of appeals affirmed the trial court's dismissal of the ethnic intimidation charges, but reversed and remanded for prosecution on the aggravated menacing charges. Finding its judgment to be in conflict with that of the Fifth District Court of Appeals in *State v. Wyant* (Dec. 6, 1990), Delaware app. No. 90-CA-2, unreported, 1990 WL 200270, the court certified the record of the case to this court for review and final determination.

Van Gundy Case: case Nos. 91-1211/91-1589

Defendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp, and Terry Breedlove, Jr. were each charged with seven counts of ethnic intimidation predicated on aggravated menacing. Clancy Van Gundy was also charged with felonious assault. He was tried and convicted on this charge. See *State v. Van Gundy* (1992), 64 Ohio St.3d 230,594 N.E. 2d 604. The trial court dismissed the ethnic intimidation counts, holding that R.C. 2927.12 is unconstitutional. The court of appeals affirmed, and, also finding its judgment to conflict with *State v. Wyant*, certified the record of the case to this court for review and final determination. This cause is also before the court pursuant to a motion for leave to appeal (case No. 91-1211). We hereby allow the motion.

W. Duncan Whitney, Prosecuting Attorney, and *Sue Ann Reulbach*, for appellee in case No. 91-199.
Lee C. Falke, Prosecuting Attorney, and *Lorine M. Reid*, for appellant in case No. 91-1519.
Michael Miller, Prosecuting Attorney, *Joyce S. Anderson* and *Katherine J. Press*, for appellants in case Nos. 91-1211/91-1589.
Lee I. Fisher, Attorney General, *Simon B. Karas* and *Eric*

A. Walker as supplementary counsel, for appellee in case No. 91-199 and appellants in case Nos. 91-1211/91-1589 and 91-1519.

Randall M. Dana, Ohio Public Defender, *Susan B. Gellman* and *Robert L. Lane*, for appellant in case No. 91-199.

Terry L. Lewis, for appellee James B. May, Jr. in case No. 91-1519.

Gary C. Schaengold, for appellee Mark J. Staton in case No. 91-1519.

Gary W. Crim, for appellee Aaron L. Plessinger in case No. 91-1519.

Wonnell, Janes & Wonnell Co., L.P.A., and *Harold E. Wonnell*, for appellee Clancy Van Gundy in case Nos. 91-1211/91-1589.

Andrew E. Lyles, for appellee Casey Van Gundy in case Nos. 91-1211/91-1589.

Samuel B. Weiner, for appellee Franklin D. Clay in case Nos. 91-1211/91- 1589.

James Kura, Franklin County Public Defender, *Allen V. Adair* and *Carole B. Schneider*, for appellee Robert Eric Blazer in case Nos. 91-1211/91-1589.

Tyack & Blackmore Co., L.P.A., and *Thomas M. Tyack*, for appellee Bryan Krebs in case Nos. 91-1211/91-1589.

Arnold S. White, Daniel T. Kobil and *Susan B. Gellman*, for appellee Charles Culp in case Nos. 91-1211/91-1589.

Terry Breedlove, Jr., pro se, in case Nos. 91-1211/91-1589.

Bruce W. Sanford and *Robert M. O'Neil*, urging reversal for *amicus curiae*, Thomas Jefferson Center for the Protection of Free Expression in case No. 91- 199.

Thomas A. Schaffer and *Annabelle Whiting Hall*, urging reversal for *amicus curiae*, National Association of Criminal Defense Lawyers in case No. 91-199, and affirmance in case Nos. 91-1211/91-1589.

Reinhart Law Office and *Harry R. Reinhart; Eslocker, Grim, Hodson & Dioguardi* and *Nicholette Dioguardi*, urging reversal for *amicus curiae*, Ohio Association of Criminal Defense Lawyers in case No. 91-199 and affirmance in case Nos. 91-1211/91-1589.

Kevin Francis O'Neill, Ohio Legal Director, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc. in case No 91-199.
Robert D. Horowitz, Stark County Prosecuting Attorney, *Kristine Wilson Rohrer* and *John E. Murphy*, Executive Director; and *Paul Cox*, urging affirmance for *amici curiae*, Ohio Prosecuting Attorney's Association, Fraternal Order of Police and Buckeye State Sheriff's Association in case No. 91-199.
Ronald J. O'Brien, City Attorney, *Marcee C. McCreary*, City Prosecutor, and *Thomas K. Lindsey*, urging reversal for *amicus curiae*, City of Columbus in case Nos. 91-1211/91-1589.
Jones, Day, Reavis & Pogue, *Steven T. Catlett* and *Richard A. Cordray*; *Schwartz, Kelm, Warren & Rubenstein* and *Nelson E. Genshaft*; *Ruth L. Lansner*, *Steven M. Freeman* and *Michael Sandburg*, urging reversal for *amicus curiae*, Anti-Defamation League in case Nos. 91-1211/91-1589.
Alphonse A. Gerhardstein, urging reversal for *amici curiae*, Housing Opportunities Made Equal (HOME), East Suburban Council for Open Communities, Toledo Fair Housing Center, Cincinnati Human Relations Commission and National Fair Housing Alliance in case Nos. 91-1211/91-1589.

HERBERT R. BROWN, J. The principal issue before us is the constitutionality of the ethnic intimidation statute, R.C. 2927.12. Before undertaking an analysis of the statute, however, we express our abhorrence for racial and ethnic hatred, and especially for crimes motivated by such hatred. We fully accept the premise which prompted the enactment of the legislation before us: that bigotry, whether expressed merely in words or by violence, does harm to its victims and to society as a whole.

The ethnic intimidation statute is a well-intentioned response to a society- threatening problem. However, the legislative response to this problem must not violate the Ohio

and United States Constitutions. For the following reasons, we find R.C. 2927.12 unconstitutional.

I
The Statute

R.C. 2927.12 reads:

"(A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons."

"(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The statute creates enhanced criminal penalties for some people who commit aggravated menacing (R.C. 2903.21),[1] menacing (R.C. 2903.22),[2] criminal damaging or endangering

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[1] R.C. 2903.21 (aggravated menacing reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family."

[2] R.C. 2903.22 (menancing) reads in part:
"(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

(R.C. 2909.06),[3] criminal mischief (R.C. 2909.07),[4] or certain types of telephone harassment (R.C. 2917.21[A][3], [4], [5]).[5]

The predicate offenses to ethnic intimidation are already punishable under other statutes. Thus the enhanced penalty must be for something more than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12, but which is not an element of the underlying

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[3] R.C. 2909.06 (criminal damaging or endangering) reads in part:
"(A) No person shall cause, or create a substantial risk of physical harm to any property of another without his consent:
"(1) Knowingly, by any means;
"(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance."

[4] R.C. 2909.07 (criminal mischief) reads in part:
"(A) No person shall:
"(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

[5] R.C. 2917.21 (telephone harassment) reads in part:
"(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:
" * * *
"(3) During the telephone call, violates section 2903.21 of the Revised Code;
"(4) Knowingly states to the recipient of the telephone call that he intends to cause damage to or destroy public or private property, and the recipient of the telephone call, any member of the family of the recipient of the telephone call, or any other person who resides at the premises to which the telephone call is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;
"(5) Knowingly makes the telephone call to the recipient of the telephone call, to another person at the premises to which the telephone call is made, or to the premises to which the telephone call is made, and the recipient of the telephone call, or another person at the premises to which the telephone call is made, has previously told the caller not to call the premises to which the telephone call is made or not to call any persons at the premises to which the telephone call is made."

statutory offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "*by reason of* the race, color, religion, or national origin of another person or group of persons." (Emphasis added.) The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive.[6] We must decide whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime.

II

Criminalization of Motive

Motive, in criminal law, is not an element of the crime. In their textbook, 1 Substantive Criminal Law (1986) 318, Section 3.6, LaFave and Scott argue that if defined narrowly enough, motive is not relevant to substantive criminal law, although procedurally it may be evidence of guilt, or, in the case of good motive, may result in leniency. Other thought-related concepts such as intent and purpose are used in the criminal law as elements of crimes or penalty-enhancing criteria, but motive itself is not punished. *Id.* at 318-324; see, also, *State v. Lampkin* (Oct. 3, 1990), Hamilton App. No. C-890273, unreported, at 5, 1990 WL 143466: "While motive may be relevant as a mitigating factor in the penalty phase, it is irrelevant to the guilt-phase determination * * *"; Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws (1991), 39 UCLA L.Rev. 333.

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of

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[6] Webster's Ninth New Collegiate Dictionary (1984) 981, defines "reason" in part as "a rational ground or motive."

different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent.

Application of the Ohio and United States Constitutions to the statute before us requires careful attention to the distinctions between motive and intent as well as the line which separates a thought from an act. These distinctions can best be understood in the context of specific applications which arise in criminal jurisprudence.

A

Motive versus Criminal Intent

Culpable mental state, or intent, is usually required to find one guilty of a crime.[7] "Intent" refers to the actor's state of

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[7] The Ohio Statute on culpable mental states, R.C. 2901.22, reads:

"(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

"(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

"(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

"(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element."

mind or volition at the time he acts. Did A intend to kill B when A's car hit B's, or was it an accident? This is not the same as A's motive, which is *why* A intentionally killed B.[8] When A murders B in order to obtain B's money, A's intent is to kill and the motive is to get money. LaFave and Scott, *supra*, at 319. One can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psychopath, on the other hand, may intend to kill and yet have no motive.

B

Motive versus Purpose to Commit Another Criminal Act

Purpose to commit an additional criminal act is frequently seen in criminal statutes as a basis for enhanced penalty or as creating a separate, more serious crime. For example, burglary is a trespass "with purpose" to commit a theft offense or felony.[9] Purpose in this content is not the same

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[8] Black's makes the distinction as well; under the definition of "intent" it states: "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Black's Law Dictionary (6 Ed.1990) 810.

[9] The Ohio statutes on aggravated burglary and burglary, respectively, state:

"2911.11 Aggravated burglary.

"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

"(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

"(2) The offender has a deadly weapon or dangerous ordinance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present;

"(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree."

as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A's intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property.[10] The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.

Criminal penalties are often enhanced using the concept of an aggravating circumstance. These also are distinguishable from motive. For example, under R.C. 2929.04, any of a number of aggravating circumstances can increase

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[9] Footnote 8 *cont.*

"2911.12 Burglary.

"(A) No person, by force, stealth, or deception, shall do any of the following:

"(1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense or any felony;

"(2) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present, with purpose to commit in the habitation any misdemeanor that is not a theft offense;

"(3) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present.

"(B) As used in this section:

"(1) 'Occupied structure' has the same meaning as in section 2909.01 of the Revised Code.

"(2) 'Theft offense' has the same meaning as in section 2913.01 of the Revised Code.

"(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) of this section is an aggravated felony of the second degree. A violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(3) of this section is a felony of the fourth degree."

[10] LaFave and Scott characterize purpose as a "medial end":

"* * * While some have taken the contrary view, it is undoubtedly better, for purposes of analysis, to view such crimes as not being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent." (Emphasis *sic*, footnotes omitted.) LaFave and Scott, 1 Substantive Criminal Law (1986) 320.

the penalty for aggravated murder to death.[11] Among these is murder committed "for the purpose of" escaping another offense. R.C. 2929.04(A)(3). The basis for enhancing the penalty in this case is once again an additional act or intent. Escaping another offense is in itself a crime. The enhanced penalty for murder does not stem from motive (*i.e.*, preference of life on the street to life in prison), but from the additional act of escape, or the intent to escape.

C
Motive versus Criminal Act

R.C. 2929.04(A)(2) declares murder for hire to be an aggravating circumstance. This is not properly seen as enhancing the penalty for a mercenary motive. Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished.

Some aggravating circumstances involve the identity of the victim, such as a peace officer or governmental official. R.C. 2929.04(A)(1), (6). The legislature has decided, in these instances, that acts against certain individuals are more serious criminal acts. Imposing a higher penalty for killing

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[11] R.C. 2929.04 reads in part:

"(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. * * *

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender." * * *

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer."

the Governor than for killing an ordinary citizen is similar to imposing a higher penalty for stealing a painting worth $1,000 than for stealing one worth only $5.

Under the above analysis, the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the *motive* or the thought which precipitated the attack would not be punished. However, R.C. 2927.12 could not have been written that way because such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

D

Motive in the Antidiscrimination Laws

Federal and state laws against discrimination in employment, housing and education do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the act of discrimination that is targeted, not the motive.

There are two theories by which a case can be made under the federal laws against employment discrimination; these are characterized as "disparate impact" and "disparate treatment." Under a disparate-impact analysis, an employment practice that is neutral on its face, but falls more harshly on a protected group, can be used to show employment discrimination. *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Teamsters v. United States* (1977), 431 U.S. 324, 335-336, 97 S.Ct. 1843, 1854-1855, 52 L.Ed.2d 396, 415, fn.15. No discriminatory motive is necessary under this analysis.

Under a disparate-treatment analysis, the employer treats some people less favorably than others because of race, color, religion, sex or national origin. Discriminatory motive is necessary to this theory. *Id.* However, proof of discriminatory motive can be inferred from differences in

treatment. *Arlington Hts. v. Metro. Hous. Dev. Corp.* (1977), 429 U.S. 252, 265-266, 97 S.Ct. 555, 563-564, 50 L.Ed.2d 450, 464-465. It is discriminatory treatment that is the object of punishment, not the bigoted attitude *per se.* " * * * Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs, supra,* 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165. It is the act of discrimination which is punished, not the thoughts (or bigotry) of the actor. Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished.

III

The Constitutional Objection to Punishment of Thought

Neither the United States nor the Ohio Constitution explicitly prohibits the punishment of thought. Both guarantee the right to freedom of speech.[12] Federal First Amendment jurisprudence has long recognized that freedom of speech presupposes freedom of thought. As Justice Stewart said in *Abood v. Detroit Bd. of Edn.* (1977), 431 U.S. 209, 234-235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261, 284:

"[A[t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

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[12] The First Amendment to the United States Constitution reads:
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
Section 11, Article I of the Ohio Constitution reads:
"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

Likewise, Justice Jackson in *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 1639, stated as follows:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

And Justice Marshall in *Stanley v. Georgia* (1969), 394 U.S. 557, 565-566, 89 S.Ct. 1243, 1248-1249, 22 L.Ed.2d 542, 550, stated as follows:

" * * * Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

" * * * [The State] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Such statements are made in the context of cases in which laws regulate speech or expressive conduct of some kind. The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes.[13] The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.

Under the First Amendment there are unprotected forms of expression. The state is allowed to punish those utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035. It does not follow, however, that there

[13] The parties do not contest that the predicate offenses are punishable.

are unprotected forms of belief.

The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects." It follows that a citizen of Ohio is free to have "sentiments on all subjects."

By enacting R.C. 2927.12, the state has infringed this basic liberty. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)?[14]

Within constitutional bounds, the legislature determines what constitutes a crime. We review that determination only to see if it comports with the Ohio and United States Constitutions. If the thought or motive behind a crime can be separately punished, the legislative majority can punish virtually any viewpoint which it deems politically undesirable, for example, a crime committed because the perpetrator (a) dislikes homosexuals, (b) likes homosexuals, (c) likes or dislikes the elderly—and so on. It requires little imagination to see the ramifications.

We recognize and are sensitive to the emotionally charged nature of the issues involved. We reemphasize that we in no way condone the acts and alleged acts that bring these cases before us. However, the very reason for the First

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[14] As Judge West of the Franklin County Court of Common Pleas said: "[T]his statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence." *State v. Van Gundy* (Mar. 28, 1990), Franklin C.P. No. 89-CR-11-5166, unreported.

Amendment and Section 11, Article I is to protect the individual against a state that is hostile simply because of the person's belief. The constitutional protection accorded to beliefs is most important when the beliefs are reviled by society. As Justice Douglas of this court has said:

"This guarantee of freedom is one of our most cherished rights and, as such, has been and continues to be under attack by persons, well-meaning and otherwise, who see attempted curtailment as being in the 'public good.' * * * It is important to often repeat that the freedoms * * * guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherisn." *Loca Lodge 1297 v. Allen* (1986), 22 Ohio St.3d 228, 236, 22 OBR 407, 414, 490 N.E.2d 865, 872 (Douglas J., concurring).

Justice Black, in his seminal dissent in *Beauharnais v. Illinois* (1952), 343 U.S. 250, 274, 72 S.Ct. 725, 739, 96 L.Ed. 919, 936, put the issue as follows:

" * * * The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches'."

Justice Black's position has become the accepted one in First Amendment jurisprudence. Justice Burger addressed the issue in *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 13, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553, 564; "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."

Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea.

The United States Supreme Court recently addressed the constitutionality of another so-called "hate crimes" law.

R.A.V. v. St. Paul (1992), 505 U.S. ---, 112 S.Ct. 2538, 120 L.Ed.2d 305. The St. Paul ordinance reads:

" 'Whoever places on pubic or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.' " *Id.*, 505 U.S. at ---, 112 S.Ct. at 2541, 120 L.Ed.2d at 315.

The St. Paul ordinance is aimed at specific conduct; that is, conduct which will arouse anger, alarm or resentment on the basis of race, color, creed, religion or gender. The Minnesota Supreme Court rejected an overbreadth claim because the ordinance had been construed to include only unprotected "fighting words." Despite this construction, the United States Supreme Court found the ordinance facially unconstitutional under the First Amendment. Justice Scalia, writing for the court, said that even the few limited categories of unprotected speech are not "entirely invisible to the Constitution." *Id.* at ---, 112 S.Ct. at 2543, 120 L.Ed.2d at 318. The government may not regulate even fighting words based on a hostility toward the message they contain. Any proscription of fighting words must not be based on content.

The court observed that the St. Paul ordinance went beyond content discrimination to viewpoint discrimination.

Quite recently the Supreme Court of Wisconsin struck down the Wisconsin "hate crimes" statute as "unconstitutionally infring[ing] upon free speech." *State v. Mitchell* (1992), --- Wis.2d ---, ---, 485 N.W.2d 807, 808. The Wisconsin law is a penalty-enhancement statute with some similarities to R.C. 2927.12. The Wisconsin statute does not use the phrase "by reason of," but instead permits a penalty enhancement for certain crimes when the defendant "[i]ntentionally selects" the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis. Stat. 939.645 (1989-90).

Despite this wording, the Wisconsin court said: "[The statute] is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law—punishment of offensive motive or thought." *Id.* at ---, 485 N.W.2d at 813. The analysis by the Wisconsin court applies with greater force to the Ohio statute. R.C. 2927.12 refers to the actor's reasons in direct, rather than indirect, terms and is more clearly aimed at punishment of bigoted thought.

R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin "hate crimes" laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.

Based upon the foregoing authorities and our analysis of the statute, we find that the effect of R.C. 2927.12 is to create a "thought crime." This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime. In fact, the behavior which is alleged in each case before us can be punished under the criminal statutes identified in R.C. 2927.12. We agree with Justice Scalia when he observed that the government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V. v. St. Paul, supra,* 505 U.S. at ---, 112 S.Ct. at 2550, 120 L.Ed.2d at 326.

The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) over- breadth. These arguments may have merit, especially in view of the concurring opinion by Justice White in *R.A.V. v. St. Paul, supra,* 505 U.S. at ---,

112 S.Ct. at 2550, 120 L.Ed.2d at 327. However, because of our holding we need not address these challenges.

IV

The Specific Cases Before Us

Having so held, we turn to the specific cases which are before us. Constitutional protection of thought does not shield a citizen from punishment for proscribed acts. Although the ethnic intimidation statute is invalid, the predicate offenses are punishable. As these offenses are mentioned specifically in R.C. 2927.12, they constitute lesser included offenses to ethnic intimidation.

In case No. 91-199, the jury was instructed that it could find David Wyant guilty of ethnic intimidation only if it first found him guilty of aggravated menacing. The verdict indicates that the jury found him guilty of aggravated menacing.

In case No. 91-1519 and 91-1211/91-1589, although the defendants cannot be tried under R.C. 2927.12, the lesser included offenses remain viable charges.

Based on the foregoing, in case No. 91-199 we reverse the court of appeals, vacate sentence on the conviction for ethnic intimidation, and remand for sentencing on the charge of aggravated menacing. We affirm the judgment of the court of appeals in case No. 91-1519. In case Nos. 91-1211/91-1589, we affirm the dismissal for ethnic intimidation, but remand for further proceedings on the underlying aggravated menacing charges.

Judgments accordingly.

In Case Nos. 91-199 and 91-1519:

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

In Case Nos. 91-1211 and 91-1589:

MOYER, C.J., UTZ, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

EUGENE J. UTZ, JR., of the First Appellate District, sitting for SWEENEY, J.

FILED, December 6, 1990

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	
	:	
	:	JUDGMENT ENTRY
-vs-	:	
	:	
DAVID WYANT,	:	
	:	
Defendant-Appellant	:	CASE NO. 90-CA-2

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas, Delaware County, Ohio, is affirmed, and this cause is remanded to that court for execution of sentence.

W. SCOTT GWIN

NORMAN J. PUTMAN

JUDGES

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. Norman J. Putman, P.J.
Plaintiff-Appellee	:	Hon. John R. Milligan, J.
	:	Hon. W. Scott Gwin, J.
-vs-	:	
	:	
DAVID WYANT,	:	Case No. 90-CA-2
	:	
Defendant-Appellant	:	
	:	
	:	OPINION

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court, Case No. 89-CR-92

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: 1990 DEC -6 PM 12:23

APPEARANCES:

For Plaintiff-Appellee

SUE ANN REULBACH
Assistant Prosecutor
149 North Sandusky Street
Delaware, Ohio 43015

For Defendant-Appellant

JAMES H. KLEIN
2 West Winter Street, Suite 9
Delaware, Ohio 43015

GWIN,J.

Appellant, David Wyant (appellant), appeals from the judgment of conviction and sentence entered upon a unanimous jury verdict of guilty to the charge of Ethnic Intimidation, in violation of R.C. 2927.12(A). Appellant assigns the following as error:

> I. THE CONVICTION IN THE DELAWARE COUNTY COURT OF COMMON PLEAS FOR VIOLATION OF O.R.C. SECTION 2927.12 (ETHNIC INTIMIDATION) SHOULD BE REVERSED BECAUSE, THE LAW UPON WHICH THE CONVICTION IS BASED, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AS TO SAFEGUARDS AGAINST VAGUE AND UNCERTAIN CRIMINAL PROSECUTION.
>
> II. THE CONVICTION IN THE DELAWARE COUNTY COURT OF COMMON PLEAS SHOULD BE REVERSED BECAUSE O.R.C. SECTION 2927.12 VIOLATES ESSENTIAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW AS SET FORTH IN THE UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT.
>
> III. THE CONVICTION IN THE DELAWARE COUNTY COURT OF COMMON PLEAS SHOULD BE REVERSED BECAUSE O.R.C. SECTION 2927.12 IS UNCONSTITUTIONALLY VAGUE AND OVER-BROAD ON ITS FACE IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENT ONE, AND THE OHIO CONSTITUTION, ARTICLE I, SECTION 11.

On August 10, 1989, an indictment was filed in the Common Pleas Court charging that appellant:

> . . . did violate section 2903.21 of the Ohio Revised Code, Aggravated Menacing, by reason of the race,

> color, religion or national origin of Jerry L. White and Patricia McGowan, to wit: did, knowingly cause Jerry L. White and Patricia McGowan to believe that he, the said DAVID WYANT, would cause serious physical harm to the person or property of said the Jerry L. White and Patricia McGowan, this being in violation of Section 2927.12 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

The charge arose while appellant was at his rented camp site at Alum Creek State Park in Delaware County on or about June 3, 1989. The adjoining camp site was rented and occupied by Jerry White and his girlfriend, Patricia McGowan. During the latter part of that evening, Mr. White on two separate occasions complained of loud music and noise from appellant's camp site.

Following a visit by a park official, appellant yelled that "we didn't have this problem until those niggers moved in next to us;" and "the black motherfucker over there, I will take my gun and kill him;" and "in fact, I will go over there and beat his black ass now."

I & II

Through his first two assignments, appellant claimed that R.C. 2927.12 is unconstitutional in that it violates the due process and equal protection clauses of the Fourteenth Amendment.

The record before us indicates that the only constitutional claim made by appellant in the trial court was that R.C. 2927.12 was unconstitutional because it violated his constitutional right to free speech under the First Amendment of the United States Constitution. Appellant made no other constitutional claim through written motion and none were specifically pointed out in the transcript on appeal. See App. R. 12(A).

Accordingly, we adhere to the well-settled principle that

we will not consider a claim of error which was neither raised or objected to in the trial court, even if the error alleged is constitutional. See *State v. Abrams* (1974), 39 Ohio St.2d 53, 55, 68 O.O. 2d 30,31. See, also, *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, 34 O.O. 2d 13.

Therefore, appellant has waived his first two assignments of error, and the same are hereby overruled.

III

In his final assignment, appellant claims that R.C. 2927.12 is so vague and overbroad on its face that it violates appellant's right to free speech as guaranteed by the First Amendment of the U.S. Constitution.

R.C. 2927.12 provides:

> (A) No person shall violate section 2903.21, 2903.22, 2909.06, or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> (B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.

It has long been stated that "freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." *Lovell v. Griffin* (1938), 303 U.S. 444, 450. However, the right of free speech is not an absolute right and may be limited or punished if it is likely to provoke the average person to retaliation thereby causing a breach of the peace. *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568.

Courts are also to "refrain from declaring legislation unconstitutional unless the posture of a cause leaves no logical alternative thereto." *Beford Hts. v. Tallarico* (1971), 25 Ohio St.2d 211, 212.

Here, we construe the statute in question as a legislative attempt to preserve the public peace and as applied to appellant, is not so vague and overbroad as to deprive him of his freedom of speech guaranteed by the United States Constitution.

Certainly, appellant's racially motivated threats that "we didn't have this problem until those niggers moved in next to us;" "the black motherfucker over there, I will take my gun and kill him;" and "I will go over there and beat his black ass now" are not constitutionally protected speech because such would likely cause a breach of the peace.

Appellant was found to have knowingly caused another to believe that he would cause serious physical harm to that person in violation of R.C. 2903.21, Aggravated Menacing. Because appellant's violation of R.C. 2903.21 involved the use of racial slurs which were likely to cause a breach of peace, appellant was indicted for violating R.C. 2927.12. Therefore, when construed together, these statutes proscribe with sufficient exactness appellant's type of conduct while not impeding upon constitutionally protected speech.

Accordingly, we overrule this final assignment.

For the foregoing reasons, the judgment of the Delaware County Court of Common Pleas is hereby affirmed, and we remand this cause to that court for execution of sentence.

Putman, P.J. concurs.
Milligan, J. dissents.

W. Scott Gwin

Norman J. Putman

JUDGES

Delaware County, Case No. 90-CA-2, Dissenting Opinion

MILLIGAN, J., DISSENTING

I would sustain each of the assignments of error and reverse the judgment of the Delaware County Common Pleas Court for the reasons stated in the opinion of Judge Patrick West in *State v. Culp* (March 28, 1990), Franklin C.P. No. 89-CR-11-5166, unreported, attached and incorporated.

JOHN R. MILLIGAN

JUDGE JOHN R. MILLIGAN

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO,	:	
Plaintiff,	:	
-vs-	:	Case No. 89-CR-92
DAVID WYANT,	:	
Defendant.	:	

JUDGMENT ENTRY ON RULING ON MOTION TO DISMISS

This case came before the court for Hearing upon Defendant's Motion to Dismiss and Memorandum in Support thereof, the same having been filed on October 10, 1989 at 8:14 o'clock and prior to the 9:00 o'clock A.M. commencement of the Trial of this case. Essentially, the thrust of Defendant's Motion is that the legislation under which the Defendant was charged, Section 2927.12(A) of the Ohio Revised Code, flies directly in the face of the First Amendment to the United States Constitution and is therefore unconstitutional. Upon consideration thereof, the Court found that the arguments advanced by the Defendant were without merit, and, accordingly, Defendant's Motion was overruled.

Insofar as the State of Ohio failed to prepare a Judgment Entry upon the Court's Ruling and Defendant's Motion, as required by Local Rule 15, the Court, pursuant to the second sentence of the second paragraph of Local Rule 15 has caused the instant Judgment Entry to be prepared.

Dated: December 21, 1989

Henry E. Shaw Jr.

HENRY E. SHAW, JR., JUDGE

cc: Sue Ann Reulbach, Assistant Prosecuting Attorney
Kelly M. Castle, Assistant Prosecuting Attorney
William J. Fleck, Jr., 555 South Third Street, Columbus, Ohio 43215

FILED, April 18, 1991

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-473
Clancy Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-474
Casey Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-475
Franklin D. Clay, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio Plaintiff-Appellant,	:	
v.	:	No. 90AP-477
Robert Eric Blazer, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-478
Bryan Krebs, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-479
Charles Culp, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-480
Terry Breedlove, Jr., Defendant-Appellee.	:	(REGULAR CALENDAR)

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on April 16, 1991, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

BOWMAN, P.J., YOUNG & KLINE, JJ.

By Donna Bowman
Judge Donna Bowman, P.J.

KLINE, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

cc: Mr. Michael Miller
Mr. Alan C. Travis
Mr. Harold Wonnell
Mr. Andrew Lyles
Mr. Samuel Weiner
Mr. James Kura
Mr. Alan V. Adair
Mr. Daniel T. Kobil
Ms. Susan B. Gellman
Mr. Arnold White
Mr. Thomas M. Tyack
Mr. Terry Breedlove, Jr.
Mr. Lee I. Fisher
Mr. Richard A. Cordray
Mr. Lee Fisher
Mr. Simon B. Karas
Mr. Eric A. Walker
Mr. Alan Wayne Sheppard
Mr. Steven T. Catlett
Mr. Alphonse A. Gerhardstein
Mr. Ronald J. O'Brien
Mr. James J. Fais
Mr. Thomas K. Lindsey

Mr. Harry R. Reinhart
Ms. Nicholette Dioguardi

FILED, April 16, 1991

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-473
Clancy Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-474
Casey Van Gundy, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-475
Franklin D. Clay, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio Plaintiff-Appellant,	:	
v.	:	No. 90AP-477
Robert Eric Blazer, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-478
Bryan Krebs, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	
v.	:	No. 90AP-479
Charles Culp, Defendant-Appellee.	:	(REGULAR CALENDAR)
State of Ohio, Plaintiff-Appellant,	:	

v.	:	No. 90AP-480
Terry Breedlove, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

OPINION
Rendered on April 16, 1992

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. ALAN C. TRAVIS, for appellant.

WONNELL, JANES & WONNELL, and MR. HAROLD WONNELL, for appellee Clancy Van Gundy. MR. ANDREW LYLES, for appellee Casey Van Gundy.

MR. SAMUEL WEINER, for appellee Franklin Clay.

MR. JAMES KURA, Public Defender, and MR. ALAN V. ADAIR, for appellee Robert Eric Blazer.

MS. SUSAN B. GELLMAN; WHITE & STOREY, and MR. ARNOLD WHITE, for appellee Charles Culp.

THOMAS M. TYACK & ASSOCIATES, and MR. THOMAS M. TYACK, for appellee Bryan Krebs.

MR. TERRY BREEDLOVE, JR., pro se.

HAHN, LOESER & PARKS, and MR. LEE I. FISHER; JONES, DAY, REAVIS & POGUE, and MR. RICHARD A. CORDRAY, for amicus curiae Senator Lee I. Fisher.

MR. LEE FISHER, Attorney General, MR. SIMON B. KARAS and MR. ERIC A. WALKER, for amicus curiae Attorney General.

SHEPPARD AND BALE, and MR. ALAN WAYNE SHEPPARD, for amicus curiae Ohio Council of Churches.

JONES, DAY, REAVIS & POGUE, and MR. STEVEN T. CATLETT, for amicus curiae Anti-Defamation League.

MR. ALPHONSE A. GERHARDSTEIN, for amicus curiae Housing Opportunities Made Equal.

MR. RONALD J. O'BRIEN, City Attorney, MR. JAMES J. FAIS, City Prosecutor, and MR. THOMAS K. LINDSEY, for amicus curiae City of Columbus.

MR. HARRY R. REINHART; ESLOCKAR, GRIM, HODSON & DIOGUARDI, and MS NICHOLETTE DIOGUARDI, for amicus curiae Ohio Association of Criminal Defense Lawyers.

APPEALS from the Franklin County Court of Common Pleas.

BOWMAN, P.J.

On November 8, 1989, the Franklin County Grand Jury returned an eight-count indictment against appellees, Clancy Van Gundy, Casey Van Gundy, Franklin Clay, Robert Blazer, Bryan Krebs, Charles Culp and Terry Breedlove, Jr., charging each of them with seven counts of ethnic intimidation, R.C. 2927.12. The charges were predicated on the underlying offense of aggravated menacing, R.C. 2903.21, in that appellees did knowingly cause the victims to believe that appellees would cause serious physical harm to them by reason of their race, color, religion or national origin. Clancy Van Gundy was also charged with felonious assault, R.C. 2903.11, in that he did knowingly cause serious physical harm to one of the victims, Jason Harris, and with a specification, pursuant to R.C. 2941.143, in that Clancy Van Gundy did, during the commission of the felonious assault, cause physical harm to Jason Harris.

On March 14, 1990, a hearing was held before the trial court on appellees' motion to dismiss the seven counts of ethnic intimidation on the basis that the ethnic intimidation statute was unconstitutional. After arguments, the court found that R.C. 2927.12 was unconstitutionally overbroad and vague

and granted appellees' motion to dismiss the seven counts of ethnic intimidation.

Thereafter, on March 28, 1990, the trial court issued a written opinion stating that R.C. 2927.12 was unconstitutional because it was vague, it violated the due process and equal protection clauses, and it had a chilling effect upon the First Amendment rights of free speech and association. The trial court dismissed Counts Two through Eight of the indictments against all of the appellees; however, Count One of the indictment, pertaining to the felonious assault charge and specification as to appellee, Clancy Van Gundy, was not dismissed and was to be tried at a later date.[1]

On April 26, 1990, appellant, the state of Ohio, appealed the dismissal of Counts Two through Eight of the indictments as to all appellees.[2] Appellant asserts the following assignment of error:

> "OHIO REVISED CODE, SECTION 2927.12, ETHNIC INTIMIDATION, VIOLATES NO CONSTITUTIONAL PROVISION AND IS NOT VAGUE OR OVERBROAD."

The issue presented to this Court is whether R.C. 2927.12 is void for vagueness or is overbroad. Appellant asserts that the statute is neither vague nor overbroad and, therefore, the trial court erred in holding it unconstitutional, and in dismissing the counts of ethnic intimidation against appellees.

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[1] Van Gundy's subsequent conviction for felonious assault was affirmed by this court in *State v. Van Gundy* (Dec. 20, 1990), Franklin App. No. 90AP-556, unreported (1990 Opinions 5876).

[2] This court notes that appellee, Terry Breedlove, Jr., has failed to file a brief in this case. However, inasmuch as the facts and issues have been briefed by the remaining appellees and are identical to all parties, this court need not accept appellant's statement of the facts and issues as correct as to appellee, Breedlove, based on his failure to file a brief. See App. R. 18(C).

R.C. 2927.12 provides:

> "(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The Due Process Clause of the Fourteenth Amendment requires reasonable definiteness in the language of a statute. *Roth v. United States* (1957), 354 U.S. 476. In *United States v. Harriss* (1954), 347 U.S. 612, the United States Supreme Court stated that the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The vagueness doctrine contemplates that criminal responsibility should not attach where an individual could not, with reasonable certainty, understand that his proposed conduct is disapproved of when measured against the language of the statute. See *State v. Loless* (1986), 31 Ohio App. 3d 5.

However, a statute is not void for vagueness merely because it could have been more precisely worded. *Roth, supra.* The legislature need not define every word of a statute, and words of ordinary usage will be given the meaning commonly attributed to them. *State v. Dorso* (1983), 4 Ohio St. 3d 60. The test is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Jordan v. DeGeorge* (1951), 341 U.S. 223.

The root of the vagueness doctrine is a rough idea of fairness. *Colten v. Commonwealth of Kentucky* (1972), 407 U.S. 104. The vagueness doctrine implies that a statute must be written so a man of common intelligence can ascertain what conduct is prohibited, and that the law must provide sufficient standards to prevent arbitrary and discriminatory enforcement. *Connally v. General Const. Co.* (1926), 269 U.S. 385; *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156.

In *Connally, supra*, the court stated that the dividing line between what is lawful and unlawful cannot be left to conjecture. The crime, and the elements constituting the crime, must be so clearly expressed that an ordinary person can intelligently choose, in advance, what course of conduct he may lawfully pursue.

Under the void for vagueness doctrine, the statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; however, in addition, the void for vagueness doctrine also requires that the statute must provide explicit standards for those who apply it so that arbitrary and discriminatory enforcement is prevented. It is this second aspect of the void for vagueness doctrine, the requirement that the legislature establish minimal guidelines to govern law enforcement, that the courts have recently recognized as being the more important aspect of the doctrine. *Kolender v. Lawson* (1983), 461 U.s. 352. Where the legislature fails to provide these minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal prejudices. *Smith v. Goguen* (1974), 415 U.S. 566. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, and with the danger of arbitrary and discriminatory application. *Grayned v. City of Rockford* (1972), 408 U.S. 104.

This court finds that R.C. 2927.12 is void for vagueness under the Due Process Clause of the Fourteenth Amendment. The statute itself does not give a person of ordinary intelligence fair warning as to what conduct is prohibited.

The statute states that no person shall violate any one of the enumerated sections " * * * by reason of the race, color, religion, or national origin of another person or group of persons." However, the statute does not indicate upon whose sensitivity a violation must depend: the sensitivity of the judge or jury; the sensitivity of the prosecutor; the sensitivity of the arresting officer; or the sensitivity of a hypothetical reasonable man. In addition, the statute does not give any indication who the other "person or group of persons" must be: the victim; a passerby; a group of people from the accused's past; the police; or anyone else. As such, the person must be able to foresee whether or not others, *i.e.*, the police, prosecutor, court or jury, will at some later time determine that his or her actions were motivated by the race, color, religion or national origin of this unknown, undetermined person or the other group of persons.

More importantly, the statute is void for vagueness because it encourages arbitrary and discriminatory enforcement. The statute vests virtually complete discretion in the hands of the state to determine whether a suspect committed the alleged acts based on the race, color, religion or national origin of another person or a group of persons. As such, the statute confers on the police a virtually unrestrained power to arrest and charge persons with a violation of ethnic intimidation. See *Lewis v. City of New Orleans* (1973), 415 U.S. 130 (Powell, J., concurring in result). Thus, the determination of whether or not a person should be charged with ethnic intimidation is entrusted to the moment-by-moment judgment of the police in any given situation. See *Kolender, supra.* The statute also furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials against particular groups who are deemed to merit their displeasure. See *Thornhill v. Alabama* (1940), 310 U.S. 88.

Another aspect affecting whether or not R.C. 2927.12 is constitutional is its infringement on the First Amendment right of freedom of speech. It is fundamental that statutes which regulate First Amendment activities must be narrowly drawn to address only the specific evil at hand. *Broadrick v.*

Oklahoma (1973), 413 U.S. 601. A law regulating speech will be deemed overbroad if it sweeps within its ambit a substantial amount of protected speech along with that speech which it may legitimately regulate. *City of Houston v. Hill* (1987), 482 U.S. 451. The Supreme Court has consistently held that statutes punishing speech or conduct solely on the ground that they are unseemly or offensive are unconstitutionally overbroad. *Doe v. University of Michigan* (E.D. Mich. 1989), 721 F. Supp. 851.

In *Grayned, supra,* the Supreme Court stated that the cases make it clear that, in assessing the reasonableness of a regulation, a court must weigh heavily the fact that communication is involved. As a result, the regulation must be narrowly tailored to further the state's legitimate interests. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression, and that particular expressive activity cannot be prohibited because of a desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint. See *Tinker v. Des Moines School Dist.* (1969), 393 U.S. 503.

The Supreme Court has applied the overbreadth doctrine in the First Amendment area when the challenged law has had a "chilling effect" on constitutionally preferred liberties. *Dombrowski v. Pfister* (1965), 380 U.S. 479; *NAACP v. Button* (1963), 371 U.S. 415; *Thornhill, supra.* Freedom of speech is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. *Staub v. City of Baxley* (1958), 355 U.S. 313.

Appellant asserts that R.C. 2927.12 does not regulate speech but, rather, enhances the penalty for unlawful conduct committed for an improper motive or purpose, *i.e.,* because of the race, color, national origin or religion of a person or group of persons. Appellant asserts that an individual cannot be charged with ethnic intimidation unless he has already committed unlawful conduct by committing one of the enumerated crimes contained in the statute and, thus, speech is not curtailed. This court disagrees. What

the ethnic intimidation statute is punishing by enhancement of the penalty for the listed criminal offenses is the spoken or written word or expression thereof by conduct.

In *Texas v. Johnson* (1989), 109 Sup. Ct. 2533, 2544, the court stated:

> "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. * * * "

In *Board of Education v. Barnette* (1943), 319 U.S. 624, at 642, the court stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. * * * "

In *Terminiello v. Chicago* (1949), 337 U.S. 1, the Supreme Court stated that a principal function of free speech under our system of government is to invite dispute. Free speech may indeed thus serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Merely advocating force does not remove speech from the protection of the First Amendment. *NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886. While the underlying conduct, *i.e.*, assault, menacing threats and the like, are crimes and may be punished, the government may not, by enhancing penalties, prohibit expression simply because it disagrees with its message. *Johnson, supra.*

This court finds that R.C. 2927.12 is unconstitutional on its face. The statute makes a crime out of what, under the constitution, cannot be a crime since it is aimed directly at activity protected by the constitution. The First and

Fourteenth Amendments do not permit a state to make criminal the exercise of the right of speech or conduct simply because its exercise may be annoying or offensive. *Coates v. City of Cincinnati* (1971), 402 U.S. 611. Further, because speech or conduct can be used to show the motivation behind a person's actions, a finding of guilt under R.C. 2927.12 is based on an undifferentiated mix partially for what is said and partially for what is illegally done and, as such, a conviction under the statute cannot stand. *Cleveland v. Mechanic* (1971), 26 Ohio App. 2d 138. See, also, *State v. Johnson* (1982), 6 Ohio App. 3d 56.

In most instances, the words or conduct of a person charged with ethnic intimidation will be the only indicia of his attitude or opinion on a subject, and this attitude or opinion is inseparably intertwined with the content of the statements or the conduct. Also, in most cases, it will solely be because of what a person says or what a person does that the police will perceive that a person's actions were motivated by the race, color, religion or national origin of another person or group of persons. Further, in most cases, it will be clear that, but for the remarks or the conduct, the individual would not be charged with ethnic intimidation, although he could be charged with the underlying crimes. The First Amendment's Free Speech Clause cannot be laid aside simply on the basis that the speaker was penalized not for his speech but for a state of mind manifested thereby. See *Tygrett v. Washington (1974)*, 543 F. 2d 840.

In *City of Cincinnati v. Black* (1966), 8 Ohio App. 2d 143, 146-147, the court, in holding that an ordinance which made it a crime to sell, offer for sale, or give away a pamphlet or paper which contained an article subjecting to ridicule or contempt any class or group of citizens on account of race, religious belief, or which in any manner tends to promote racial hatred or religious bigotry unconstitutional, stated:

> "It is thus seen that the ordinance undertakes to control the extent of free expression in the fields of religious and political affairs, two fields which

> have been given the widest possible latitude by constitutional interpretation; and also in the field of race relations which, while not written directly into either the federal or state Constitutions, has nevertheless in present day society, by judicial interpretation of the Fourteenth Amendment and by legislative enactment, received wide-spread public attention.
>
> The ordinance makes it an offenses to communicate hatred and bigotry in the fields of race and religion. Bigotry and hatred reflect a mental attitude which does not necessarily become translated into human behavior. Great honor is almost universally paid to the special commandment 'that ye love one another,' but no means has as yet been found or attempted to compel this highly commendable viewpoint by law. Obviously any attempt to do so would border very closely on thought control which is resisted (even to the extent of permitting bigotry and intolerance) by every legal precept we know."

This court finds that this sentiment is equally applicable in the instant case. The constitutional protection of the First Amendment does not depend upon the truth, popularity or social utility of the ideas and beliefs put forward. *Craig v. Harney* (1947), 331 U.S. 367. Where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a court will take the extraordinary step of enjoining the state prosecution. *Dombrowski, supra.*

This court recognizes that, by holding R. C. 2927.12 unconstitutional, we have struck down a statute that deals with an extremely significant problem in our society. The concern of citizens with criminal activity motivated by the race, color, religion or national origin of another person or group of persons is certainly a matter requiring the attention of all branches of government. However, as weighty as this concern may be, it cannot justify legislation that would

otherwise fail to meet constitutional standards for definiteness and clarity. While the objective of the legislation cannot be questioned and the conduct sought to be punished is reprehensible, R.C. 2917.12 in its sweeping reach and its imprecise method of enforcement is incompatible with due process requirements. These constitutional considerations may not be dismissed merely because there is a laudatory legislative end sought to be achieved. See *State v. Young* (1980), 62 Ohio St. 2d 370, certiorari denied *Ohio v. Young* (1980), 449 U.S. 905.

Therefore, based on the foregoing, this court finds that the trial court did not err in determining that R. C. 2927.12 was unconstitutional. The statute allows arbitrary and discriminatory action by police, prosecutors, courts and juries permitting them on a case-by-case basis, to subjectively determine whether the conduct or speech or action before them violates the statute. It does not provide fair warning to a person of ordinary intelligence that contemplated conduct will violate the statute because it is overbroad and violates the First Amendment right to free speech and conduct. Accordingly, appellant's assignment of error is not well taken and is overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

YOUNG and KLINE, JJ., concur

KLINE, J., of the Pickaway County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

FILED, March 28, 1990

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	
	:	
PLAINTIFF	:	
	:	CASE NO. 89-CR-11-5166
VS.	:	A,B,C,D,E,F,G
	:	
CLANCY VAN GUNDY, ET AL	:	JUDGE WEST
	:	
DEFENDANTS	:	

ENTRY DISMISSING COUNTS TWO THROUGH EIGHT OF THE INDICTMENT

For the reasons set forth in my opinion filed this date, Defendants' Motion to Dismiss the indictments against all defendants as set forth in Counts Two through Eight of the Indictment is hereby granted. The indictment against Clancy Van Gundy as to Count One shall stand.

West
JUDGE

Approved:

Arnold S. White
Arnold S. White (Whi02)

Harold E. Wonnell (per tel 3/26/90)
Harold E. Wonnell (Won01)

Samuel B. Weiner (per tel 3/26/90)
Samuel B. Weiner (Wei05)

Andrew E. Lyles (per tel 3/26/90)
Andrew E. Lyles (Lyl04)

Thomas M. Tyack (per tel 3/26/90)
Thomas M. Tyack (Tya01)

Carol Schneider (per tel 3/28/90)
Carol Schneider

Edward W. Morgan as to form only (per tel 3/26/90)
Edward M. Morgan (Mor03)

FILED, March 28, 1990

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	
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PLAINTIFF	:	
	:	CASE NO. 89-CR-11-5166
VS.	:	A,B,C,D,E,F,G
	:	
CLANCY VAN GUNDY, ET AL	:	JUDGE WEST
	:	
DEFENDANTS	:	

OPINION

This matter came on to be heard by written Motions to Dismiss Counts Two through Eight of the Indictments submitted by Defendants Culp, Clancy Van Gundy, and Breedlove and upon the oral motions of the other defendants at hearing, for the reasons advanced by counsel for Culp and Clancy Van Gundy. The Prosecution filed memoranda contra to the written motions and express no opposition to the other defendants joining in the Motions at hearing.

The reasons advanced in the Motions to Dismiss were that the statute on its face violates the First, Sixth and Fourteenth Amendments to the U.S. Constitution and Article One, Section Eleven of the Ohio Constitution. The Court agrees and sustains the Motion to dismiss Counts Two through Eight of the Indictment.

Defendants were indicted in felony Counts Two through Eight for violation of (2927.12 O.R.C. by reason of (2903.21 O.R.C. (a misdemeanor). Motions were filed by various defendants, and the Court set March 14, 1990 as the date for hearing all pending motions, including the Motions to Dismiss. No facts were placed in evidence, and the hearing was based solely on the pleadings and the law.

The law presumes a statute constitutional and Courts are instructed to give the words of a statute their plain meaning when no expression of legislative intent in published. However, where a law is so written that persons "of common intelligence must guess as to its meaning and differ as to its application" it must be struck as void for vagueness. *Connally v. General Construction Co.*, 269 U.S. 385, 391. The Court finds that (2927.12 O.R.C. requires a person of normal intelligence to "speculate as the meaning" of this penal statute. *See State v. Kasnett*, 34 O.S. 193.

The Court notes that the statute provides no objective standard of conduct to guide a citizen and his counsel as to the actions proscribed. (2927.12 O.R.C. does not make clear the interplay between it and the related sections of the code to which it refers, does not set forth an acceptable culpable mental state nor does it make clear what must be done "knowingly", does not define "by reason of", and does not specify whether the race or ethnicity of another refers to the victim or someone other than the victim. It would also invite arbitrary enforcement and selective prosecution.

The statute violates the Due Process and Equal Protection Clauses in that, as it is written, it bears no reasonable relationship to a legitimate public purpose. Further, the law cannot pass Constitutional muster because the punishment of one convicted of committing an act of violence against another would not be enhanced if "by reason of" the race, etc. of another, although the punishment would be enhanced against one convicted of merely threatening to do so.

The Court also find that this statute is void because of its chilling effect upon First Amendment rights of speech and association. In effect, this statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence.

The indictments as to all the defendants as set forth in Counts Two through Eight are hereby dismissed. Defendant Clancy Van Gundy still stands accused as indicted in Count

One and his trial shall remain set for May 20, 1990. All other motions pending are rendered moot by reason of this opinion.

West

JUDGE

FILED, June 27, 1991

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO Plaintiff-Appellant	: :	
VS.	:	Case No. 12239
JAMES B. MAY, JR. Defendant-Appellee	: :	(C.P. #89-CR-4687) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	: :	
VS.	:	Case No. 12259
MARK J. STATON Defendant-Appellee	: :	(C.P. #90-CR-660) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	: :	
VS.	:	Case No. 12260
AARON L. PLESSINGER Defendant-Appellee	: :	(C.P. #90-CR-660) FINAL ENTRY

. . . . . .

Pursuant to the opinion of this court rendered on the 27th day of June, 1991 the judgment of the trial court is Reversed in part and Affirmed in part and Remanded to the trial court for further proceedings.

R K Wilson

RICHARD K. WILSON, Judge

James A. Brogan
JAMES A. BROGAN, Judge

Thomas J. Grady
THOMAS J. GRADY, Judge

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Hon. John W. Kessler
Judge - Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45402

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO Plaintiff-Appellant	:	
VS.	:	Case No. 12239
JAMES B. MAY, JR. Defendant-Appellee	:	(C.P. #89-CR-4687) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	:	
VS.	:	Case No. 12259
MARK J. STATON Defendant-Appellee	:	(C.P. #90-CR-660) FINAL ENTRY

* * * * * *

STATE OF OHIO Plaintiff-Appellant	:	
VS.	:	Case No. 12260
AARON L. PLESSINGER Defendant-Appellee	:	(C.P. #90-CR-660) FINAL ENTRY

. . . . . .

OPINION

Rendered on the 27th day ofJune 1991

. . . . . .

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Attorney for Aaron L. Plessinger

. . . . . .

BROGAN, J.

This appeal encompasses three separate cases pursuant to the granting of a motion for consolidation made by the appellate, the State of Ohio, based on the fact that all three cases involve the same issue, whether R.C. 2927.12(A) is constitutional.

The appellant raises one assignment of error in which it contends that the trial court erred, in each of the cases, in holding that Section 2927.12(A) of the Ohio Revised Code is unconstitutional and in subsequently dismissing the charges against each defendant, the appellees herein.

In the case of James B. May, Jr., on December 26, 1989 at approximately 1:00 a.m., the Dayton Police were dispatched to 328 Warren Street, Dayton, Ohio on a complaint from Mr. Gregory Crawford that May and several other white men were threatening Crawford and his friends, screaming racial slurs at them. One person in May's group had a gun. When the police arrived, they heard loud voices and screams inside the building. May, who was the landlord, stated that he and his companions came in for two purposes: one (1), to tell Crawford to turn off his space heater and two (2), to check the broken windows in the building. May further stated that a black male exited Crawford's room with a kitchen knife, but was pulled back in by another black male. Crawford claimed that May's son, who was with May, threatened him

with a gun and that another man, Robert Amann, threatened Crawford and his friends with a tire iron and that May's group made racial slurs against Crawford and his friends. Subsequently, May, his son and Amann were arrested.

In the cases of Mark J. Staton and Aaron L. Plessinger, on February 8, 1990 at approximately 11:25 p.m., the Dayton Police were dispatched to 515 Sheridan, Dayton, Ohio on a disturbance call. This was the residence of Jessie and Dianne Bowlin. Mr. Bowlin, who is white, had two black visitors in his home. Three neighbors, including Staton and Plessinger, began yelling racial slurs at Bowlin's visitors and called Mr. Bowlin a "nigger lover". The men threatened the lives of Bowlin and his guests and threw a rock through Bowlin's front window. When the police arrived, the three men ran off. A car belonging to one of Bowlin's guests was also damaged by the three men. After some investigation, both Plessinger and Staton were arrested.

In each instance, the Montgomery County Grand Jury returned an indictment charging each defendant with one (1) count of aggravated menacing in violation of R.C. 2903.21 by reason of the race and/or color of the victims in violation of R.C. 2927.12.

On May 8, 1990, May filed a motion to dismiss. The trial court granted the motion on May 15, 1990, finding:

> This Court finds pursuant to *Petrillo, supra,* that the legislature could have, and should have, drafted Ohio Revised Code §2927.12 using an authorized, defined culpable mental state for the additional element of the offense. This Court finds that "by reason of" as used in Ohio Revised Code §2927.12 described no statutorily cognizable mental state, as required by Ohio Revised Code §2901.21 for an element of the offense, and is, therefore, impermissibly constitutionally vague under Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

> Further, vagueness of constitutional proportion arises in Ohio Revised Code §2927.12 because the language of the act does not sufficiently specify the relationship of the race, et cetera of the other "person or group of persons" to the actor or victim. It would be quite clear if the conduct of the offender was based on the *victim's* race, color, religion, et cetera; or upon a member of the *victim's immediate family*, as is the style used in the menacing statutes (Ohio Revised Code §2903.21 and .22). (emphasis added). As presently worded, however, the statute leaves to speculation who or what group is subject to official attention. Other than specifying that the action of the offender be by reason of race, et cetera of *another* person or group, no further relationship criteria are stated, leaving one to guess as to its application.
>
> Again, this Court finds that the legislature could have, and should have drafted Ohio Revised Code §2927.12 clearly defining the relationship of the persons or group to the victim of the intimidation. The failure to do so renders the statute unconstitutionally vague, in violation of Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

On May 21, and May 30, 1990, Plessinger and Staton filed motions to dismiss based on the *May* decision and these motions were sustained on May 24 and May 31, 1990, respectively. It is from these decisions and the decision in the *May* case that appellant appeals.

It is appellant's contention that R.C. 2927.12 is constitutional and that therefore it was error on the part of the trial court to find the section unconstitutional. We disagree.

R.C. 2927.12 states:

"(A) No person shall violate section 2903.21

> [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], or 2909.07 [criminal mischief], or division (A)(3), (4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The trial court found this section to be unconstitutional on vagueness grounds. In order to find a statute unconstitutional, it must be proven *beyond a reasonable doubt.* Proof beyond a reasonable doubt is necessary due to the strong presumption of constitutionality for statutes designed to promote the public health, safety and welfare. *State v. Anderson* (1991), 57 Ohio St.3d 168. In *Anderson,* the court stated:

> In order to prove such an assertion, the challenging party must show that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all: * * * " *Coates v. Cincinnati* (1971), 402 U.S. 611, 614. In other words, the challenger must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law.

While the Due Process Clause of the Fourteenth Amendment requires that there be reasonable definiteness in the language of a statute, it will not be void for vagueness simply because it could be stated more precisely. *Roth v. United States* (1957), 354 U.S. 476. The Franklin County Court of Appeals, in addressing the same issue, found R.C. 2927.12

to be unconstitutionally vague on the grounds that a person of ordinary intelligence does not have "fair warning as to what conduct is prohibited":

> This court finds that R.C. 2927.12 is void for vagueness under the Due Process Clause of the Fourteenth Amendment. The statute itself does not give a person of ordinary intelligence fair warning as to what conduct is prohibited. The statute states that no person shall violate any one of the enumerated sections " * * * by reason of the race, color, religion, or national origin of another person or group of persons." However, the statute does not indicate upon whose sensitivity a violation must depend: the sensitivity of the judge or jury; the sensitivity of the prosecutor; the sensitivity of the arresting officer; or the sensitivity of a hypothetical reasonable man. In addition, the statute does not give any indication who the other "person or group of persons" must be: the victim; a passerby; a group of people from the accused's past; the police; or anyone else. As such, the person must be able to foresee whether or not others, *i.e.*, the police, prosecutor, court or jury, will at some later time determine that his or her actions were motivated by the race, color, religion or national origin of this unknown, undetermined person or the other group of persons.

State v. Van Gundy, et al. (Apr. 16, 1991), Franklin App. No. 90AP- 473, unreported.

We find the reasoning of the Franklin County Court of Appeals to be persuasive, and we affirm the trial court for the reasons articulated in that opinion.

On December 6, 1990, the Delaware County Court of Appeals in *State v. David Wyant* (Dec. 6, 1990), 90CA-2, Delaware App. unreported found the statute was not vague or overbroad and thus not unconstitutional under the Fourteenth Amendment.

Since our opinion in this case is in conflict with the Delaware County Court of Appeals we would entertain a motion to certify this case to the Supreme Court for ultimate resolution of the constitutionality of R.C. 2972.12.

The trial court erred in dismissing the entire charge as the underlying lesser included menacing charge remained for prosecution. The judgment of the trial court is reversed in part and affirmed in part and remanded to the trial court for further proceedings.

. . . . . .

WILSON, J., and GRADY, J., concur.

Copies mailed to:

Lorine M. Reid
Terry L. Lewis
Gary C. Schaengold
Gary W. Crim
Hon. John W. Kessler

FILED, May 15, 1990

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,		
Plaintiff,	:	CASE NO. 89-CR-4687/2
-vs-	:	(Judge John W. Kessler)
	:	
JAMES B. MAY, JR.,	:	DECISION AND ORDER SUSTAINING DEFENDANT'S,
Defendant.	:	JAMES B. MAY, MOTION TO DISMISS

: : : : :

This case is before the Court on Defendant's, James B. May, Jr., Motion to Dismiss the indictment charging him with Ethnic Intimidation in violation of Ohio Revised Code §2927.12. Specifically, the indictment alleges that Defendant and two others violated Ohio Revised Code §2903.21 (Aggravated Menacing) vis-a-vis Gregory Crawford, Antonio Goldsmith and Florence Crawford, and that they did so by reason of said individual's race and/or color.

Defendant moves to dismiss on the grounds that Ohio Revised Code §2927.12 is (1) unconstitutionally void for vagueness in violation of the Fourteenth Amendment of the United States Constitution, (2) unconstitutionally denies Defendant equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution, and (3) unconstitutionally denies Defendant his right to free speech in violation of the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution.

While Defendant's Memorandum in Support of his Motion suffers substantially from the same malady Defendant attributes to Ohio Revised Code §2927.12, the Court concludes that Defendant's specific complaints of vagueness are that no objective tests are provided within the statute

to determine what is meant by the phrase "by reason of"; and that the phrase "another person or group of persons" is far too overbroad.

Vagueness claims are grounded in the constitutional principle announced in *Connally vs. General Construction Co.*, 269 U.S. 385 (1926) wherein the court declared that, as a matter of due process, a law is void on its face if it is so vague that a person "of common intelligence must necessarily guess at its meaning and differ as to its application." Such indefiniteness offends due process because those laws invite arbitrary and discriminatory enforcement, and fail to give persons fair notice of what conduct to avoid. *Columbus vs. Thompson*, 25 Ohio St. 2d 26 (1971); *Papachristou vs. Jacksonville*, 405 U.S. 156 (1972). This Court is mindful, however, of the principle set forth in *United States vs. Harris*, 347 U.S. 612 (1954), to-wit: ". . . If this general class of offenses (to which the statute applies) can be made constitutionally definite by a reasonable construction of that statute, the court is under a duty to give the statute that construction." In *Rose vs. Locke*, 423 U.S. 48 (1975), the court further stated that the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." The Ohio Supreme Court, in *State vs. Dorso*, 4 Ohio St. 3d 60 (1983), cited the aforementioned cases with approval in upholding the constitutionality of Cincinnati's "Loud Musical Noises" ordinance, which prohibited playing music in a manner "to disturb the peace and quiet of the neighborhood . . . " The court made a finding that "the concept of neighborhood and the closeness it implies are well within the ken of the ordinary person."

The only case cited to this Court dealing with interpretation of this particular statute in Ohio is *State vs. Gundy* (Franklin Co. Common Pleas Case No. 89-CR-11-5166, unreported) (1990). Defendant does not refer this Court to any analogous statutes or cases from any other state. In *Gundy, supra*, Judge West condemns Ohio Revised Code §2927.12 because:

1) It does not make clear the interplay between

it and the code sections to which it refers,
2) It does not set forth an acceptable culpable mental state,
3) It does not make clear what must be done knowingly,
4) It does not define "by reason of,"
5) It does not specify to whom the race, color, religion or national origin shall belong.

A predicate finding to vagueness is whether it would have been practical for the legislature to draft the statute more precisely. *U.S. vs. Petrillo,* 332 U.S. 1 (1947). Here, the laudable legislative purpose for Ohio Revised Code §2927.12 is quite clear. The legislature obviously intended to enhance the penalties for certain offenses (Menacing, Aggravated Menacing, Criminal Damaging, Criminal Mischief, and Telephone Harassment) when the offender was motivated by racial, ethnic, or religious hatred or bigotry. Rather than amending the particular offenses for enhanced penalties based on this criteria, as is the statutory scheme with much of Ohio's criminal law, the legislature chose to attempt to enact a new criminal offense, and create an additional element for its commission.

Ohio Revised Code §2901.21 requires that a person is not guilty of an offense unless his liability is based *both on conduct* (a voluntary act or omission) *and culpability for each element* of the offense. (emphasis added) Ohio Revised Code §2901.21(C)(3) further states that, " 'Culpability' means purpose, knowledge, recklessness or negligence as defined in section 2901.22 of the Revised Code." In Ohio Revised Code §2927.12 the only element for the commission of the crime, other than the commission of one of the underlying offenses, is the "reason" (motive) of the actor. The question then is, what cognizable mental state does "by reason of" describe? The closest estimation appears to be "purpose," i.e., the person's "specific intention to engage in conduct of that nature" (Ohio Revised Code §2901.22(A)); but likewise, "knowledge," i.e., the person's awareness that his conduct "will probably be of a certain nature" (Ohio Revised Code §2901.22(B)), can definitionally apply. Unfortunately, as is

discussed in Ohio Jury Instructions 409.01(7), rather than being an element, "The presence or absence of motive is one of the circumstances bearing on purpose or knowledge." The comment to this section suggests that "motive is the subjective inducement or reason that prompted the purpose."

This Court finds pursuant to *Petrillo, supra,* that the legislature could have, and should have, drafted Ohio Revised Code §2927.12 using an authorized, defined culpable mental state for the additional element of the offense. This Court finds that "by reason of" as used in Ohio Revised Code §2927.12 describes no statutorily cognizable mental state, as required by Ohio Revised Code §2901.21 for an element of the offense, and is, therefore, impermissibly constitutionally vague under Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Further vagueness of constitutional proportion arises in Ohio Revised Code §2927.12 because the language of the act does not sufficiently specify the relationship of the race, et cetera of the other "person or group of persons" to the actor or victim. It would be quite clear if the conduct of the offender was based on the *victim's* race, color, religion, et cetera; or upon a member of the *victim's immediate family,* as is the style used in the menacing statutes (Ohio Revised Code §2903.21 and .22). (emphasis added) As presently worded, however, the statute leaves to speculation who or what group is subject to official attention. Other than specifying that the action of the offender be by reason of the race, et cetera of *another* person or group, no further relationship criteria are stated, leaving one to guess as to its application.

Again, this Court finds that the legislature could have, and should have, drafted Ohio Revised Code §2927.12 clearly defining the relationship of the persons or group to the victim of the intimidation. The failure to do so renders the statute unconstitutionally vague, in violation of Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Given these findings, this Court need not reach Defendant's other claims against the statute.

Defendant's Motion is well taken. This case against Defendant is ordered DISMISSED.

SO ORDERED:

J. W. Kessler

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

Lee C. Falke, Montgomery County Prosecutor (Attn: Richard D. Hanes)

Terry L. Lewis, Attorney for Defendant, Suite 500, 111 West First Street, Dayton, Ohio 45402

Tim Walker, Bailiff

FILED, May 15, 1990

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 90-CR-660
-vs-	:	(Judge John W. Kessler)
	:	
MARK J. STATON,	:	DECISION AND ORDER
Defendant.	:	SUSTAINING DEFENDANT'S,
	:	MOTION TO DISMISS

:::::

This case is before the Court on Defendant's Motion to Dismiss the charge of Ethnic Intimidation, in violation of Ohio Revised Code 2927.12. For the reasons stated in this Court's decision reference James B. May, Jr.,'s motion to dismiss on identical grounds (89-CR- 4687), Defendant's Motion is found well taken and is hereby SUSTAINED.

SO ORDERED:

_____

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

Lee C. Falke, Montgomery County Prosecutor (Attn: Richard D. Hanes)

Victor A. Hodge, Attorney For Defendant, 367 West Second Street, Suite 110, Dayton, Ohio 45402

Tim Walker, Bailiff

FILED May 15, 1990

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 90-CR-660
-vs-	:	(Judge John W. Kessler)
AARON LEE PLESSINGER,	:	DECISION AND ORDER SUSTAINING DEFENDANT'S
Defendant.	:	MOTION TO DISMISS

: : : : :

This case is before the Court of Defendant's Motion to Dismiss the charge of Ethnic Intimidation, in violation of Ohio Revised Code §2927.12. For the reasons stated in this Court's decision reference James B. May, Jr.'s motion to dismiss on identical grounds (89-CR-4687), Defendant's Motion is found well taken and is hereby SUSTAINED.

SO ORDERED:

_____

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

Lee C. Falke, Montgomery County Prosecutor (Attn: James R. Levinson)

Ted Rice, Attorney for Defendant, 301 W. Third Street, Dayton, Ohio 45422

Assignment Office

Tim Walker, Bailiff

OHIO REVISED CODE § 2901.22 Culpable mental states.

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from the due car, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

OHIO REVISED CODE §4112.02 (H) Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(H) For any person to:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of the housing;

(2) Represent to any person that housing is not available for inspection, sale, or rental when in fact it is available, because of race, color, religion, sex, ancestry, handicap, or national origin of any prospective owner, occupant, or user of the housing;

(3) Refuse to lend money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing or otherwise withhold financing of housing from any person because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the neighborhood in which the housing is located, provided that the person, whether an individual, corporation, or association of any type, lends money as one of the principal aspects or incident to his principal business and not only as a part of the purchase price of an owner-occupied residence he is selling nor merely casually or occasionally to a relative or friend;

(4) Discriminate against any person in the terms or conditions of selling, transferring assigning, renting, leasing, or subleasing any housing or in furnishing facilities, service, or privileges in connection with the ownership, occupancy, or use of any housing, including the sale of fire, extended coverage, or homeowners insurance, because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the

neighborhood in which the housing is located;

(5) Discriminate against any person in the terms or conditions of any loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing because of the race, color, religion, sex, ancestry, handicap, or national origin of any present or prospective owner, occupant, or user of the housing, or because of the racial composition of the neighborhood in which the housing is located;

(6) Refuse to consider without prejudice the combined income of both husband and wife for the purpose of extending mortgage credit to a married couple or either member thereof;

(7) Print, publish, or circulate any statement or advertisement relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing or the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing which indicates any preference, limitation, specification, or discrimination based upon race, color, religion, sex, ancestry, handicap, or national origin, or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning race, color, religion, sex, ancestry, handicap, or national origin in connection with the sale or lease of any housing or the loan of any money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing. Any person may make inquiries, and make and keep records concerning race, color, religion, sex, ancestry, handicap, or national origin for the purpose of monitoring compliance with this chapter.

(9) Include in any transfer, rental, or lease of housing any restrictive covenant, or honor or exercise, or attempt to honor or exercise, any restrictive covenant, provided that the prior inclusion of a restrictive covenant in the chain of title shall not be deemed a violation of this provision;

(10) Induce or solicit or attempt to induce or solicit a

housing listing sale, or transaction by representing that a change has occurred or may occur with respect to the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located, or induce or solicit or attempt to induce or solicit such sale or listing by representing that the presence or anticipated presence of persons of any race, color, religion, sex, ancestry, handicap, or national origin, in the area will or may have results such as the following:

(a) The lowering of property values;

(b) A change in the racial, religious, sexual, or ethnic composition of the block, neighborhood, or area in which the property is located;

(c) An increase in criminal or antisocial behavior in the area;

(d) A decline in the quality of the schools serving the area.

(11) Deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting housing accommodations, or to discriminate against any person in the terms or conditions of such access, membership, or participation on account of race, color, religion, sex, national origin, handicap, or ancestry;

(12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (h) of this section;

(13) Discourage or attempt to discourage the purchase by a prospective purchaser of a housing unit, by representing that any block, neighborhood, or area has undergone or might undergo a change with respect to the religious, racial, sexual, or ethnic composition of the block, neighborhood, or area;

(14) Refuse to sell, transfer, assign, rent, lease, sublease, finance, or otherwise deny or withhold a burial lot from any person because of the race, color, sex, age, ancestry,

handicap, or national origin of any prospective owner or user of such lot.

18 USCS § 242 Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 USCS § 243 Exclusion of jurors on account of race or color

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection of summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

18 USCS § 245 Federally protected activities

(a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in

this section shall be undertaken by the United States, except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this section shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with-

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from-

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election,

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been-

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit,

service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, serv ices, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which served the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial

portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from-

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate-

shall be fined not more than $1000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if

such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer" means any officer of the United States, the District of Columbia, a State, or political subdivision of the State, who is empowered by law to conduct investigations of, or make arrests because of offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

(d) For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

42 USCS § 2000c-6(a) Civil actions by the Attorney General

(a) Complaint; certification; notice to school board or college authority; institution of civil action; relief request; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants. Whenever the Attorney General receives a complaint in writing-

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the

> effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board of authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower an official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to grant of effective relief hereunder.

Respectfully submitted,

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COUNSEL OF RECORD
FOR STATE OF OHIO